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NO.

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

ROBERT M. McDONALD,

Petitioner,

-vs-

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution because the State's evidence at trial was insufficient to permit the jury rationally to find petitioner guilty of murder beyond a reasonable doubt.

2. Whether the State's deliberate elicitation of a prejudicial statement from petitioner during the course of a murder investigation which had focused upon petitioner as the prime suspect, in the absence of counsel known by the State to have been retained by petitioner, constituted an impairment of petitioner's representation by counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution, when that statement was introduced into evidence at petitioner's trial.

3. Whether, when the State purposely

intrudes into an existing attorney-client relationship, and secures a prejudicial statement from a suspect in a criminal investigation, the State's conduct is violative of either the right to counsel under the Sixth and Fourteenth Amendments, or the right to due process of law under the Fourteenth Amendment of the United States Constitution.

4. Whether the submission by the State of false evidence to the grand jury, material to the question of the guilt of an accused, is a denial of the liberty of the accused without due process of law in violation of the Fourteenth Amendment of the United States Constitution, where the falsity of that evidence becomes known to the prosecutor prior to the trial on the indictment returned by the grand jury, and the prosecutor fails to inform the grand jury of the falsity of such evidence and have it reconsider the indictment in the light of such new information.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 2

[A] THE TRIAL..... 3

[B] THE CLOCK-RADIO INTERROGATION.....10

[C] THE GRAND JURY TESTIMONY.....14

ARGUMENT

PETITIONER ADVANCES THE FOLLOWING REASONS FOR THE ALLOWANCE OF CERTIORARI

A.

SUBMISSION TO THE JURY OF THE ISSUE OF APPLICANT'S GUILT CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE.....18

B.

THE USE AT TRIAL OF STATEMENTS DELIBERATELY ELICITED BY THE STATE FROM PETITIONER IN THE ABSENCE OF RETAINED COUNSEL DURING THE COURSE OF A CRIMINAL INVESTIGATION WAS VIOLATIVE OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENTS RIGHT OF

Page

COUNSEL, AS WELL AS HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.....26

1. THE RIGHT OF COUNSEL.....28

2. DUE PROCESS OF LAW.....37

3. WAIVER.....42

C.

THE STATE'S KNOWLEDGE THAT EVIDENCE SUBMITTED TO THE GRAND JURY WAS FALSE REQUIRED, AS A MATTER OF DUE PROCESS, THAT THE GRAND JURY BE APPRISED OF THAT FACT SO THAT IT COLD RECONSIDER THE INDICTMENT.....48

CONCLUSION.....59

APPENDIX

Opinion of Superior Court of New Jersey, Law Division.....1a

Opinion of Superior Court of New Jersey, Appellate Division.....8a

Judgment of Conviction.....34a

Order of New Jersey Supreme Court Denying Petition for Certification.....37a

Order of Honorable William J. Brennan, Jr., (Circuit Justice) Denying Application for Bail Pending Certiorari.....38a

Constitutional Provisions Involved.....39a

TABLE OF CASES

Page

Bracy v. United States,
435 U.S. 1301 (1978).....55,56,57

Brady v. Maryland,
373 U.S. 83 (1963).....58

Brewer v. Williams,
430 U.S. 387, (1977).....43,46

Cahill v. Rushen,
510 F.Supp. 1219 (E.D.Cal. 1980).....46

Carnley v. Cochran,
369 U.S. 506, (1962).....48

Costello v. United States,
350 U.S. 359 (1956).....57

Cuyler v. Sullivan,
446 U.S. 335 (1980).....33,34,35

Delk v. Atkinson,
498 F. Supp. 1282 (M.D. Tenn.
1980).....21,24

Delk v. State,
__ Tenn. __, 590 S.W.2d
435 (1979).....22,23

Frink v. State,
597 P.2d 154 (Alas. 1979).....54

Holloway v. McElroy,
632 F.2d 605 (4th Cir. 1980).....23,25

In re Grand Jury Investigation
of FMC Corp., 430 F.Supp. 1108
(S.D.W.Va. 1977).....39,40

Jackson v. Virginia,
443 U.S. 307 (1979).....8,9,18,19,
20,21,24,
25

Page

Johnson v. Superior Court,
15 Cal. 3d 248, 124 Cal.
Rptr. 32, 539 P.2d 792 (1975).....54

Johnson v. Zerbst,
304 U.S. 458, (1938).....46

Kirby v. Illinois,
406 U.S. 682 (1972).....30,31

Massiah v. United States,
377 U.S. 201 (1964).....28,29,30,
31,43,46

Michigan v. Mosley,
423 U.S. 96 (1975).....44

Miranda v. Arizona,
384 U.S. 436 (1966).....11,47

Napue v. Illinois,
360 U.S. 264 (1960).....52

State v. Brown,
80 N.J. 587, 404 A.2d 1111 (1979).....8,19

State v. Reese,
91 N.M. 76, 570 P.2d 614
(Ct.App. 1977).....50,52

State v. Reyes,
50 N.J. 454, 236 A.2d 385 (1967).....8,19

United States v. Basurto,
497 F.2d 781 (9th Cir. 1974).....50,52,56

United States v. Batchelor,
484 F.Supp. 812 (E.D.Pa. 1980).....38

United States v. Ciambrone,
601 F.2d 616 (2d Cir. 1979).....54

Page

United States v. Dionisio,
410 U.S. 1 (1973).....58

United States v. Gold,
470 F.Supp. 1336 (N.D.Ill. 1979).....54,55

United States v. Goldman,
451 F.Supp. 518 (S.D.N.Y. 1978).....50

United States v. Guillette,
547 F.2d 743 (2d Cir. 1976).....50

United States v. Henry,
__ U.S. __, 100 S.Ct. 2183,
65 L.Ed.2d 115 (1980).....29,39

United States v. Howard,
426 F.Supp. 1067 (W.D.N.Y. 1977).....39

United States v. Marion,
404 U.S. 307 (1971).....41,42

United States v. Morrison,
__ U.S. __, ___ S.Ct. __, 66
L.Ed.2d 564 (1981).....36

United States v. Provenzano,
440 F.Supp. 610 (N.D.Okla. 1977).....54

United States v. Springer,
460 F.2d 1344 (7th Cir. 1972).....38,40

United States v. Thomas,
474 F.2d 110 (10th Cir. 1973),
cert. den., 412 U.S. 932 (1973).....38

Page

OTHER AUTHORITIES CITED

ABA Standards, The Prosecution Function, §3.6(b)(1971).....54

Kamisar, Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does It Matter?, 67 Geo.L.J.1 (1978).....30,33

Note, "Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel," 53 Indiana L.Jour. 313 (1978).....33,45

OPINIONS BELOW

The opinion of the Law Division of the Superior Court of New Jersey on the post-verdict motions issued on July 2, 1979, is unreported (App. pp. 1a, et seq.). The opinion of the Appellate Division of the Superior Court of New Jersey, filed December 4, 1980, is unreported (App. pp. 82, et seq.). The judgment of conviction entered by the Law Division (App. pp. 34a, et seq.) and the order of the New Jersey Supreme Court denying certification (App. p. 37a) are set forth in this Appendix, as is the order of the Honorable William J. Brennan, Jr., (Circuit Justice) denying petitioner's application for bail pending certiorari (App. p. 38a).

JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate Division, was entered on December 4, 1980, affirming petitioner's conviction dated July 9, 1979. The Appellate Division denied a timely petition for

rehearing on December 29, 1980. Thereafter, on February 10, 1981, the Supreme Court of New Jersey denied a petition for certification. On March 12, 1981, Justice Brennan signed an order extending the time for filing this petition for certiorari to and including April 27, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The text of the constitutional provisions involved is set forth in the Appendix (App. pp. 39a, et seq.).

STATEMENT OF THE CASE

This petition for certiorari is filed on behalf of Robert M. McDonald to seek review of a judgment of conviction of the Appellate Division of the Superior Court of New Jersey which affirmed the conviction entered by the Law Division of the Superior

Court of New Jersey. Petitioner was convicted of the second degree murder of his wife, for which he has been sentenced to serve between 12 and 15 years in the New Jersey State Prison.

[A] THE TRIAL

Petitioner and his wife Doris had been married some thirty-five years when her body was discovered in the bedroom of their home in Middlesex, New Jersey, at about 2:00 p.m. on December 16, 1976 by her sister, Janet Weinman. Petitioner was at work in his foundry some distance from the home at the time of the discovery. He had left for work at his customary time of about 4:15 a.m. that morning -- a fact adequately corroborated. The victim was scheduled to leave for her own job later that morning, but was prevented from doing so by her murder by bullet wounds through the use of a .32 calibre firearm which has never been found. Neither petitioner nor the victim were ever known to possess such

a firearm.

Petitioner admitted in a statement he voluntarily gave the police on the date of the murder that he had an intermittent relationship with a woman residing in Florida which had given his wife some concern. He said, however, that he and his wife were getting along well at the time of her death, and that they occupied the same bed the night and morning of the fatal occurrence. The State at trial expressly eschewed advancing petitioner's relationship with the other woman as a motive for the murder of the victim. Indeed, the State conceded that it was unable to establish any motive to show why petitioner would kill his wife.

There was medical testimony on the part of the State and on behalf of the petitioner indicating that death could have occurred anywhere from 8 to 18 hours prior to the examination of the body by the medical examiner at about 5:00 p.m. on

December 16, 1976. Thus, the potential time frame for the killing was from 11:00 p.m. of the previous evening to 9:00 a.m. of the day of examination of the body. This meant that the homicide could have occurred during the almost 5 hours after petitioner left for work, as well as during the five hours before.

Aside from evidence derived at the murder scene, and petitioner's statement to the police, the only other evidence adduced by the State was a circumstance occurring more than two months after the murder. While cleaning up the bedroom where his wife's body was found, petitioner discovered and discarded a clock-radio containing an apparent bullet hole which went unobserved during the police investigation. When interrogated by a detective from the prosecutor's office about the clock-radio, petitioner claimed that his son-in-law had thrown it in the garbage.

Petitioner's presentation at trial

consisted of evidence designed to expose the weakness of the State's circumstantial case. The State's theory that his wife was dead before she ever had the chance to go to bed was undermined by the fact that the bed on which she was found had apparently been slept in. Testimony from a daughter established that Doris McDonald would not remove her jewelry when she went to bed, would sleep in her undergarments, and would not pull up the shades when she awoke in the mornings because of extreme modesty.

The police investigation revealed the presence of human blood and fibrous material in fingernail scrapings taken from the victim, which would suggest that she struggled with her assailant. This evidence did not correspond with any scratches on petitioner's person, or rips in his clothing. There was testimony by a neighbor who heard an automobile loudly accelerating away from the front of petitioner's home at 6:00 a.m., almost two hours after petitioner

left the home. The locks on the doors and windows in the home were shown to be insecure, making an entry without breaking easily accomplished. A neighbor who habitually stayed awake through the early morning hours, and who would periodically surveil the neighborhood, noticed no unusual lights on at the McDonald home, and heard no gunshots.

Petitioner elected not to testify at his trial. However, petitioner did introduce unimpeached evidence of his peaceable character at the trial, to demonstrate the unlikelihood of his committing the brutal crime charged. The jury also heard that petitioner had undergone major surgery for cancer several months before his wife's death, and had arranged for the increase of group life insurance on his life payable to his wife.

Petitioner moved for an acquittal as a matter of law at the end of the State's case, at the end of the petitioner's case

and by motion for a judgment of acquittal notwithstanding the verdict. Each of these motions addressed the issue of the insufficiency of the evidence to permit a reasonable jury to find the accused guilty of the charge beyond a reasonable doubt. In applying that standard the New Jersey courts require giving the State the benefit of all its favorable testimony as well as all the favorable inferences which could reasonably be drawn therefrom. State v. Reyes, 50 N.J. 454, 459, 236 A.2d 385 (1967). This standard of sufficiency of the evidence is essentially the same as that declared in Jackson v. Virginia, 443 U.S. 307 (1979), as requisite to sustain the validity of a state criminal verdict under the due process clause of the Fourteenth Amendment. See State v. Brown, 80 N.J. 587, 591, 404 A.2d 1111 (1979).

Although Jackson v. Virginia, supra, was not cited to the New Jersey courts in the instant case, the decision having been

rendered after the trial and not having come to the attention of trial counsel when the appeal was presented to the Appellate Division, the constitutional point should be entertained as a matter of substantial justice, and, if necessary, as plain error. Petitioner did at trial and on appeal assert the failure of the evidence to attain the required degree of sufficiency under a rule of law substantively identical with that required to assure a due process conviction. If an appraisal of the evidence by a federal court establishes that the Jackson standard was not met, justice demands that relief would be afforded on the federal constitutional ground of due process notwithstanding it was not articulated in the state courts eo nomine. As to the independent obligation of a federal court to appraise the sufficiency of the evidence for the foregoing purpose, see Jackson, supra, 443 U.S. at 318.

[B] THE CLOCK-RADIO INTERROGATION

Soon after the discovery of his wife's body in the marital home, petitioner became the chief suspect and focus of investigatory efforts being made by the Middlesex County Prosecutor's Office into the death of Doris McDonald. Conscious of this aura of suspicion, petitioner within several days of his wife's death contacted an attorney, present counsel for the defendant, seeking legal advice and representation during the ongoing investigation. Petitioner's attorney immediately contacted the county prosecutor, and advised him that he had undertaken the representation of petitioner.

More than two months after Doris McDonald's death, Detective Joseph Zimmerman, a member of the Prosecutor's staff assigned to the investigation, received a telephone call from a son-in-law of petitioner relating that a clock-radio with an apparent bullethole in it had been

discovered during the course of cleaning and removing furniture from the bedroom where Doris' body was found. The son-in-law, who had his attention called to this apparent bullethole by petitioner, reported to Detective Zimmerman that petitioner had stated that he was going to throw the clock-radio out. The detective arranged to have petitioner's garbage seized from the front of his home on the following morning, and therein was found the clock-radio which, upon disassembly and inspection, revealed a spent bullet fired from a .32 caliber handgun.

Shortly after retrieving the clock-radio, Detective Zimmerman, knowing that petitioner was represented by counsel, showed up unannounced at petitioner's place of employment and requested to speak with him. Rather than burden the proceedings by reciting the entire Miranda* litany prior to questioning, the detective simply

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* Miranda v. Arizona, 384 U.S. 436 (1966).

informed petitioner that he need not answer any questions. Petitioner was then asked whether he knew anything about a clock-radio, and he answered by stating that his son-in-law threw the clock-radio out in the garbage.

At the trial, the statements made by petitioner to the detective were admitted to evidence his consciousness of guilt, and to show that he had lied during the course of the State's investigation. The petitioner, through counsel, timely objected to the introduction of these statements as violative of his Sixth Amendment right to counsel and his constitutional right to due process of law. Following a pretrial hearing at which both Detective Zimmerman and the petitioner testified concerning the clock-radio interrogation, defense counsel sought to exclude the statements from evidence, arguing:

> DEFENSE COUNSEL: Whether you want to consider it a Sixth Amendment violation, a due

> process violation, or simply a matter of public policy, I think that the exclusionary rule has to be applied in this case. (Trial Trans. 5/1/79: page 14, lines 1 to 4)

The trial judge, finding no prosecutorial misconduct of "constitutional proportion," admitted petitioner's statements into evidence. On appeal to the Appellate Division of the Superior Court of New Jersey, petitioner renewed his argument that the admission of his statements into evidence at the trial was constitutionally objectionable. That court considered and rejected petitioner's claim, stating in its opinion:

> Nor was defendant denied counsel during the interrogation. Quite to the contrary, defendant knew that he did not have to answer any questions. Thus, when he answered he acted voluntarily. In these circumstances we do not see how his Sixth and Fourteenth Amendment right to counsel was infringed. (App. p. 29a)

In seeking certification from the New

Jersey Supreme Court, petitioner unsuccessfully urged that court to accept review to consider his claim that the admission of his statements into evidence was constitutionally proscribed.

[C] THE GRAND JURY TESTIMONY

The grand jury that indicted this petitioner for murder was seriously misled by the evidence presented by the State concerning the critical issue as to the time of death of Doris McDonald. Petitioner in his statement to the police admitted that he and his wife were alone in their home until approximately 4:30 a.m. on December 16, 1976, when petitioner left for work. The only issue for resolution was whether petitioner's wife was alive or dead when he left the home. If the State could show that Doris McDonald died before 4:30 a.m., its case against the petitioner would be clinched.

The county medical examiner, Dr. Marvin Shuster, appeared before the Middlesex

County grand jury and told that body that, based on the results of an autopsy performed by him, Doris McDonald had died at 2:00 a.m. on December 16, 1976. When asked whether that estimate would vary in any respect, Dr. Shuster said that the time of death conceivably may have been as late as 5:00 a.m., but that any variation would more probably favor an earlier time of death, i.e., prior to 2:00 a.m. This testimony clearly and directly undermined petitioner's assertion that his wife was alive when he left the home.

The trial jury heard radically different testimony from Dr. Shuster concerning the time of death issue. When asked by the State for his opinion as to the time of death, the doctor said that Doris McDonald could have died at any time within a range from 11:00 p.m. on December 15 to 9:00 a.m. on December 16, 1976. This testimony mirrored the opinions of the petitioner's forensic medical experts (characterized by

the trial court as "superstar" witnesses), and was the subject of a post-trial hearing at which petitioner sought the dismissal of the indictment on federal due process grounds

At the post-trial hearing, Dr. Shuster sought to reconcile his trial and grand jury testimony. It was his position, and the State's, that there was no change in testimony as to time of death. It was asserted that the medical testimony before the grand and trial jury circumscribed the same 10 hour period as the range of time within which Doris McDonald's death must have occurred.

It was and is petitioner's position that the State, long before trial, knew that the medical examiner would provide testimony concerning time of death far less inculpatory than that provided to the grand jury. Notwithstanding this knowledge, the State did not notify either counsel for the petitioner or the court of this anticipated

testimony. Most significantly, the State chose not to correct the misconceptions concerning time of death under which the grand jury that voted to indict was laboring, by re-presenting the matter to another grand jury.

The alleged due process violation under the Fourteenth Amendment was fully raised before, and considered by, the courts below. At the conclusion of the State's case at trial, counsel for petitioner moved to dismiss the indictment based upon the false testimony adduced before the grand jury. (Trial Trans. 5/7/79: pp. 26 to 33, passim) At the conclusion of the trial, petitioner sought and was granted an evidentiary hearing at which the circumstances surrounding the alleged false testimony, and the prosecutor's knowledge thereof, were fully developed. (Motion Trans. 6/28/79) The trial court denied petitioner's motion for dismissal, (App. p. 1a) and the issue was again raised

before the Appellate Division, which affirmed the ruling of the trial court. (App. p. 28a)

ARGUMENT

PETITIONER ADVANCES THE FOLLOWING REASONS FOR THE ALLOWANCE OF CERTIORARI

A.

SUBMISSION TO THE JURY OF THE ISSUE OF APPLICANT'S GUILT CONSTITUTED A DENIAL OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE

In Jackson v. Virginia, 443 U.S. 307 (1979), this Court established a new standard of review for federal courts to use in evaluating the sufficiency of the evidence supporting a state court conviction. The precise formulation of the test in Jackson is that the defendant is entitled to federal relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt". 443 U.S. at 324. The essential identity of the Jackson test with that employed in New

Jersey is evidence by footnote 12 of the Jackson opinion wherein it is indicated that the formulation of the principle there is not novel, citing a court of appeals formulation - "whether, taking the view [of the evidence] most favorable to the Government, a reasonably-minded jury could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt". (443 U.S. at 319-320); Cf. State v. Brown, 80 N.J. 587, 404 A.2d 1111 (1979); State v. Reyes, 50 N.J. 454, 236 A.2d 385 (1967).

To establish the identity of petitioner as his wife's murderer, the State constructed a chain of circumstances from the largely undisputed evidence at trial which it urged would allow the jury to draw inferences of guilt. There was no evidence of a break-in at the home, and nothing of value appeared to have been taken. The decedent was apparently not sexually molested before she

was shot. The State sought to have the jury infer that Doris McDonald was shot by her husband before she ever had the opportunity to go to bed on the evening of December 15.

The State proved that petitioner had an opportunity, but not an exclusive opportunity, to commit the crime. The State did not, however, prove a motive. Nor was there a weapon that could in any manner be linked to petitioner.

It is submitted that, under the standard of review articulated by this Court in Jackson v. Virginia, supra, as a matter of Fourteenth Amendment due process of law, the evidence against the petitioner at the trial in this case was too speculative and problematical to justify submission of the issue of his guilt to a jury. The only arguably substantial evidence of petitioner's guilt was his presence in the house with the victim during a period of time in which she could possibly have been killed;

whereas she could equally as well have been killed during a period of time when it was established incontrovertibly that he was not in the house with her.

A case strongly supportive of petitioner's position is Delk v. Atkinson, 498 F. Supp. 1282 (M.D. Tenn. 1980), where the court on defendant's habeas application applied the Jackson test in a circumstantial murder case, and set aside the state court conviction of defendant on due process grounds. In Delk v. Atkinson, supra, as in the present case, the only substantial connection between the defendant and the murder of the victim was his presence in the same place as the victim for a portion of the time during which the killing could have taken place.

The murder victim in Delk was a storekeeper who was slain while alone in his store. Defendant was seen entering the store approximately 15 minutes before the discovery of the storekeeper's body. There

was evidence that defendant may have owed the victim money, and the relations between them were not cordial. The only other evidence involved some papers belonging to the victim discovered on a highway the day after the murder, which the State suggested were taken by the defendant while he was in the store and discarded by defendant's brother, who admitted driving on the highway several hours after the murder, but denied discarding the papers. Two individuals who rode with the brother corroborated his testimony that no papers were thrown from the vehicle in the area where the victim's papers had been found.

In Delk v. State, __ Tenn. __, 590 S.W.2d 435 (1979), the Tennessee Supreme Court concluded that the circumstantial case against defendant "would support a finding beyond a reasonable doubt that no one else could have entered the store, committed the crime, and left unobserved." Id., 590 S.W.2d at 442. The district court

in Delk, following a detailed examination of the trial evidence, found that there was a period of time -- albeit less than three minutes -- when defendant was not in the store during which the murder may have occurred. Based on its finding that defendant's opportunity to commit the crime was non-exclusive, and based on the insubstantial nature of the motive and other circumstantial evidence, the district court in Delk concluded that no rational trier of fact could have found defendant guilty beyond a reasonable doubt.

Petitioner submits that no rational fact finder could take the undisputed circumstantial evidence in his case and, with confidence in the integrity of the verdict to be returned, "pile inference on top of inference" to reach a finding of guilt beyond a reasonable doubt. Holloway v. McElroy, 632 F.2d 605, 641 (4th Cir. 1980). Yet this is prescisely what both the trial court (App. pp. 5 to 7a) and the

appellate court (App. pp. 21a to 25a) allowed.

The courts below seriously abused the legitimate inference drawing power reserved to the jury. Jackson requires that the evidence at trial be reviewed in the light most favorable to the prosecution, but surely does not sanction a power or authority in the jury to draw unreasonable inferences. The appellate court, for example, concluded that the fact that decedent's body was discovered when petitioner telephoned a neighbor to check on the anticipated delivery of appliances permitted an inference that petitioner was attempting to arrange for the discovery of his wife's body by a third party. (App. pp. 24a). That inference depends for its validity upon a conclusion that petitioner was guilty of his wife's murder. It assists not one whit in determining the underlying issue of petitioner's guilt or innocence. As so aptly stated in Delk v. Atkinson, supra, 498 F. Supp. at 1290, that evidence and so much of the

circumstantial evidence here "provides no inferences for either side to draw, though it provides a source of boundless speculation for the mystery-minded".

The decision in Jackson v. Virginia, supra, is relatively recent and the state courts are uniformly concerned with what type of evidence-weighing process that decision will require. This Court's guidelines -- especially in the difficult circumstantial evidence cases such as the instant one -- will be very helpful in ensuring uniformity of decision-making by the state appellate courts, since the Jackson standard is now the minimal standard of review that the state courts will be free to employ under the Fourteenth Amendment. Cf. Holloway v. McElroy, supra. Such guidelines by this Court would also assist the federal district courts, which must contend with federal habeas corpus petitions alleging violations of Jackson in the state courts. For these policy reasons,

as well as the injustice of the result reached below, petitioner submits that his case is an appropriate one for this Court's review.

B.

THE USE AT TRIAL OF STATEMENTS DELIBERATELY ELICITED BY THE STATE FROM PETITIONER IN THE ABSENCE OF RETAINED COUNSEL DURING THE COURSE OF A CRIMINAL INVESTIGATION WAS VIOLATIVE OF PETITIONER'S SIXTH AND FOURTEENTH AMENDMENTS RIGHT OF COUNSEL, AS WELL AS HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Within hours of the discovery of his wife's body, petitioner became the prime focus of the State's investigation as a suspect in her homicide. Petitioner was aware of his target status and sought the protection of retained counsel. The prosecution knew of petitioner's represented status when, in March, 1977, Detective Zimmerman, a member of the Prosecutor's staff, went to petitioner's foundry for the purpose of interrogating him about the clock-radio. Although the detective told petitioner that he need not answer any

questions, nothing was said about petitioner's right to seek the advice of counsel. Petitioner elected to respond to the detective's questioning.

At trial, Detective Zimmerman related that petitioner disavowed any responsiblity for the clock-radio's being found in the garbage, and that petitioner instead claimed that his son-in-law had put it there. The son-in-law testified at trial that he did not discard the clock-radio, and that petitioner had stated to him that he would get rid of the clock-radio by putting it out with the garbage.

The prejudicial nature of the testimony concerning the discarding of the clock-radio, in the light of the entirely tenuous circumstantial case against petitioner, is obvious. It is petitioner's contention that the deliberate elicitation of statements from him in the absence of counsel known by the State to have been retained for the defense of any prosecution arising out of

the criminal investigation, was violative of petitoner's Sixth and Fourteenth Amendments right of counsel. In the alternative, petitioner contends that the substantial prejudice to the conduct of his defense as a result of the prosecution's intentional circumvention of counsel for petitioner in conducting the interrogation was violative of petitioner's Fourteenth Amendment right to due process of law.

1. THE RIGHT OF COUNSEL

In Massiah v. United States, 377 U.S. 201 (1964), incriminating statements were purposely and surreptitiously obtained by the government from an accused under indictment and represented by counsel by monitoring his conversations with a co-defendant acting as an agent of the government. In reversing a conviction entered following a trial at which these incriminating statements were introduced into evidence, this Court held:

"[T]he petitioner was denied the

> basic protection of...[the Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." Massiah v. United States, supra, 377 U.S. 206.

Last term, in United States v. Henry, ___ U.S. ___, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Court acknowledged that "[t]he Massiah holding rests squarely on interference with [the] right to counsel."

It is petitioner's contention that the deliberate elicitation of his statements in the absence of his counsel, known by the prosecution to have been retained for the defense of an imminent criminal prosecution, constitutes interference with the right to counsel of a degree and kind calling for the application of Massiah's exclusionary sanction. The issue posed here is both timely and important. It is also, perhaps, a close one. As recently stated by Professor Kamisar:

> Although I deem it clear that

> the "beginning" of a "criminal prosecution" activates the right to counsel, regardless of whether the suspect is represented by counsel at the time, the converse - the legal effect of representation by counsel when the criminal prosecution has not yet begun - is much less clear. But if I am correct in my belief that the Massiah doctrine is in no small part a "symbolic response" to the violation of the symbol of a fair trial, then the Court is likely to respond similarly to police interferences with the attorney-client relationship. Kamisar, Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does It Matter?, 67 Geo.L.J. 1,91-92 (1978).

The position of the respondent in respect of this point has been that the right to counsel does not attach until there has been a formal commencement of adversarial proceedings in the nature of a prosecution against the suspect. See Kirby v. Illinois, 406 U.S. 682 (1972). In Massiah itself, the Court considered the fact that the accused was under indictment when statements were elicited to be significant, since that conduct therefore occurred "at a time when he was clearly entitled to

a lawyer's help." Massiah v. United States, supra, 377 U.S. at 205. The existence or non-existence of such a "critical stage," however, should not obscure the fact that there was an improper and prejudicial interference with the effective exercise of the counseling function by the prosecution's interrogation of petitioner in the absence of counsel known by the State to have been retained in connection with the criminal investigation and impending prosecution.

The "critical stage" analysis speaks to when society must afford a lawyer to an individual enmeshed in the criminal justice process, to protect his right to the effective assistance of counsel at trial. (See, e.g., Kirby v. Illinois, supra, holding that a State need not, under the Sixth and Fourteenth Amendments right to counsel, make counsel available to a suspect required to undergo a pre-indictment lineup.) But neither society nor this

Court is being asked here to afford petitioner a lawyer. The request is merely to allow counsel of petitioner's choice to represent petitioner's interests in a criminal investigation (where, as here, that investigation will foreseeably lead to a criminal prosecution), unfettered by purposeful prosecutorial conduct that undermines that relationship and counsel's ability to provide his client with his constitutionally guaranteed right to effective assistance of counsel at time of trial.

If this Court, by accepting review, should consider the basis upon which the Sixth Amendment right to the effective assistance of counsel may be incepted absent the "critical stage" traditionally associated with the onset of such right, there are several arguments that may be advanced. It might be urged, as Professor Kamisar suggests, that the circumstance of actual representation prior to the onset of

a "criminal prosecution" is itself an event sufficient to trigger the protections of the Sixth Amendment. Kamisar, supra, 67 Geo.L.J. at 91-92; Note, "Interrogation and the Sixth Amendment: The case for Restriction of Capacity to Waive the Right to Counsel," 53 Indiana L.Jour. 313 (1978). Where such actual representation exists, the attorney-client relationship created is of sufficient dignity and importance to merit constitutional safeguards against its intentional impairment and destruction by the prosecution.

There is an additional argument for extending protection to the petitioner under the Sixth and Fourteenth Amendments which emerges from the decision in Cuyler v. Sullivan, 446 U.S. 335 (1980). In Cuyler, the Court held that a petitioner's claim of ineffective assistance of counsel by a privately retained lawyer can provide the basis for federal habeas corpus relief under the Sixth Amendment. In its opinion,

the Court acknowledged that a denial of the right to counsel may only be established "upon a showing that the State participated in the denial" of that right. Id., 446 U.S. at ___, 64 L.Ed. 2d at 343.

The petitioner in Cuyler neither alleged nor proved that the state officials knew or should have known of the denial of his right to the effective assistance of counsel, which stemmed from petitioner's claim of a conflict of interest by his counsel. This Court nevertheless reasoned that the conduct of retained counsel involves state action, and held that a conviction obtained in a trial in which the defendant's counsel, whether retained or appointed, is ineffective violates the Sixth Amendment. The Court concluded:

> "Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal

assistance." Cuyler v. Sullivan, supra, 446 U.S. at ___, 64 L.Ed. 2d at 344.

Under Cuyler, there is a duty upon the States not to engage in conduct that impairs the effective exercise of the right to counsel. This duty is independent of the duty imposed upon the States to appoint counsel, which duty does not arise until a "critical stage" in the criminal prosecution has been reached. Petitioner submits that intentional conduct by the State which threatens to undermine an existing attorney-client relationship, and impairs the effectiveness of counsel, will be struck down because violative of the duty to refrain from any action leading to denial of the effective assistance of counsel.

Under a Cuyler analysis, the Sixth and Fourteenth Amendment violation alleged here was not the pre-indictment interview that resulted in the obtaining of a statement from petitioner in the absence of his counsel. Had the State not sought to

introduce this statement against petitioner at trial, and if petitioner was otherwise unable to show prejudice, the petitioner would have been without any remedy to contest that action in the context of his criminal trial. See United States v. Morrison, __ U.S. ___, S.Ct. __, 66 L.Ed.2d 564 (1981). Indeed, assuming petitioner had been under indictment when the interview with Dectective Zimmerman took place, it is not even clear whether there would be any cognizable violation of the constitutional right to counsel, absent prejudice at time of trial. See United States v. Morrison, supra. The altogether tenuous significance of a "critical stage" having been reached to the constitutional concern for the effective assistance of counsel, under the circumstances of the present case where the attorney-client relationship predates the return of an indictment, is readily apparent.

The invocation of a criminal prosecution marks the point at which the prosecution

must either deal with accused through his retained or assigned counsel, or obtain a valid waiver of that right. By imposing this duty, this Court assuredly did not intend to license prosecutorial interference with an existing attorney-client relationship prior to the inception of the actual prosecution. Because the issue herein has yet to be considered by this Court, petitioner would submit that review is appropriate and highly desirable.

2. DUE PROCESS OF LAW

If this Court should view the prosecution's conduct in eliciting statements from petitioner as falling outside the legitimate scope of the Sixth Amendment right to counsel, that conduct may alternatively be viewed as a violation of the due process clause of the Fourteenth Amendment. The interrogation of petitioner at his foundry by Detective Zimmerman was an intentional and purposeful interference with an existing attorney-client relationship. The

fact that a "criminal prosecution" may not yet have commenced at the point that the interrogation was conducted should not obscure the realizaton that the prosecution's conduct had an adverse impact on petitioner's legal position at trial.

The courts below construed the conduct of the prosecution in eliciting petitioner's statement in the absence of counsel as constituting, at most, an ethical infraction rather than a denial or impairment of petitioner's right to counsel. (App. p. 29a) The practice of the prosection in visiting suspects represented by counsel, without prior notice to counsel of the contact to be made, has caused concern for the lower courts that have had the opportunity to address this problem. See United States v. Thomas, 474 F.2d 110 (10th Cir. 1973), cert. den., 412 U.S. 932 (1973); United States v. Springer, 460 F.2d 1344 (7th Cir. 1972) (Stevens, J., dissenting); United States v. Batchelor, 484 F.Supp.

812 (E.D.Pa. 1980); In re Grand Jury Investigation of FMC Corp., 430 F.Supp. 1108 (S.D.W.Va. 1977); United States v. Howard, 426 F.Supp. 1067 (W.D.N.Y. 1977).

Last term, in United States v. Henry, __ U.S. __, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), the Court, in suppressing incriminating statements deliberately elicited by the Government from a defendant under indictment, who may have been represented by counsel when the elicitation took place, noted:

> Although it does not bear on the constitutional question in this case, we note that Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility provides:
> "(A) During the course of his representation of a client a lawyer shall not:
> "(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."
> See also Ethical Consideration 7-18.
> United States v. Henry, supra, __ U.S. at __, 65 L.Ed.2d at 125, n. 14.

As a general proposition, disciplinary rules such as the above "are designed to establish and assure standards of simple fairness and moral and ethical responsibility on the part of counsel in furtherance of the ends of justice." In re FMC Corp., supra, 430 F.Supp. at 1110.

In United States v. Springer, supra, Justice (then Judge) Stevens in dissent opined that the conduct of government agents in visiting a defendant represented by counsel for the purpose of obtaining incriminating evidence, even where the defendant subsequently waived his right to counsel under the Sixth Amendment, violated due process of law since counsel was not present and had not received advance notice of the visit.

> In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from "procedural regularity" as to violate the due process clause of the Fifth Amendment. United States v. Springer, supra, 460 F.2d at 1355.

Petitioner's claimed due process violation also draws support from this Court's opinion in United States v. Marion, 404 U.S. 307 (1971). The defendant in Marion urged that a substantial pre-indictment delay had resulted in a denial of his Sixth Amendment right to a speedy trial. The specific holding in Marion was that the speedy trial guarantee applies only after a person has been "accused" of crime, and refused to extend that Sixth Amendment guarantee to any Government delay which predated an arrest. However, the Court accepted the Government's concession that the Due Process Clause of the Fifth Amendment would require dismissal of an indictment where the pre-indictment delay "was an intentional device to gain tactical advantage over the accused," and if that delay substantially prejudiced the right of the accused to a fair trial. Marion, supra, 404 U.S. at 324.

Petitioner has been prejudiced in his

defense at trial by the State's intentional elicitation of statements from him in the absence of retained counsel. If this Court finds the circumvention of counsel by the prosecution to constitute an intentional practice designed to gain an unfair advantage over a represented criminal suspect, it should draw upon the Marion pre-indictment delay analogy and strike down that practice as violative of petitioner's right to due process of law.

3. WAIVER

The appellate court, while seemingly finding that petitioner enjoyed a right to counsel under the Sixth and Fourteenth Amendments when interrogated by Detective Zimmerman, went on to hold that this right was not infringed. (App. p. 29a) The basis for this holding is that court's ratification of the trial court finding that, when petitioner answered the detective's questions, he did so voluntarily and thereby waived his right. It is petitioner's

contention that, assuming the waiver concept is applicable at all under the circumstances of his encounter with the detective, there was no waiver.

This Court does not appear to have definitively resolved whether a waiver of the right to counsel, once counsel has been retained, will excuse the prosecutorial practice of interrogating a suspect in the absence of his lawyer for the purpose of deliberately eliciting statements from him. In Brewer v. Williams, 430 U.S. 387, 405-406 (1977), the Court noted the conflict on this issue in the Courts of Appeals, and assumed without deciding that a waiver of rights under the Sixth and Fourteenth Amendments was possible under circumstances otherwise proscribed by Massiah.

If the Court by accepting review is disposed to consider the issue, petitioner would urge that waiver is inappropriate whenever a suspect that the State knows is represented by counsel is subjected to

interrogation for the purpose of deliberately eliciting statements from him in his lawyer's absence. The suspect, by retaining counsel, has served notice upon the State that he lacks confidence in his own ability to deal with the State's interrogators on a level of parity. As aptly expressed by Justice White, concurring in Michigan v. Mosley, 423 U.S. 96, 110 n. 2 (1975):

> [T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistance to make a statement without counsel's presence may properly be viewed with skepticism.

A compelling argument for restricting the application of the waiver doctrine under the circumstances of the present case

has been suggested by one commentator, as follows:

> The argument for limiting waiver of the right to counsel emerges from the sixth amendment. The constitutional right to counsel is meant to counteract the handicaps of a suspect enmeshed in the machinery of criminal process. Once accused has sought the safeguard of counsel, it is unfair to let skilled interrogators lure him from behind the shield into an unequal encounter. To permit officers to question a represented suspect in the absence of counsel encourages them to undermine the suspect's decision to rely upon counsel. Such interrogation subverts the attorney-client relationship. Note, "Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel," 53 Indiana L.Jour. 313, 315 (1978).

If waiver of the right to counsel is to be recognized at all under the circumstances of petitioner's encounter with Detective Zimmerman, the standard for a valid waiver is assuredly not the "voluntariness" standard adopted by the court below. The voluntariness of petitioner's statements

plays no part in determining their admissibility under Massiah. The basis for Massiah's exclusionary rule is not that an individual's will may be overborne and his Fifth Amendment privilege against self-incrimination imperiled, but rather that the role of an attorney as an effective advocate on behalf of his client shall not be impaired. As recently stated in Cahill v. Rushen, 510 F.Supp. 1219, 1224 (E.D.Cal. 1980):

> "[F]or Sixth Amendment purposes, the fact that a confession may be 'voluntary' (a product of the defendant's untrammeled free will) or 'volunteered' (not the result of custodial interrogation) is simply irrelevant. Rather, Massiah seeks to protect the attorney's role as counselor and advocate in its broadest sense."

Waiver of the Sixth Amendment right to counsel must be established by proof of an "intentional relinquishment or abandonment of a known right or privilege." Brewer v. Williams, supra, 430 U.S. at 404, quoting Johnson v. Zerbst, 304 U.S. 458,

464 (1938). When Detective Zimmerman questioned petitioner, he did so without informing him of the right to counsel. Assuming that petitioner had been informed of his right to counsel at the interviews with Zimmerman conducted on the day that his wife's body was discovered, there is nothing to show that petitioner understood that he enjoyed this right during the interview conducted three months later at the foundry. Any inference that petitioner must have known from the prior administration of Miranda warnings that he had a right to an attorney is undermined by the realization that Zimmerman, at this subsequent interview, informed defendant of his right to remain silent, yet deleted any reference to the right to counsel. By receiving such a partial warning, at variance with the previous full warnings provided to him, petitioner could logically and reasonably conclude that he had no right to have counsel present during the interview.

Finally, even if waiver is appropriate, and even if petitioner knew that he had a right to the presence of counsel when interrogated about the clock-radio, the record is barren of any evidence showing an intentional relinquishment of that right. As this Court has held in a Sixth Amendment context, "[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." Carnley v. Cochran, 369 U.S. 506, 516 (1962).

C.

THE STATE'S KNOWLEDGE THAT EVIDENCE SUBMITTED TO THE GRAND JURY WAS FALSE REQUIRED, AS A MATTER OF DUE PROCESS, THAT THE GRAND JURY BE APPRISED OF THAT FACT SO THAT IT COULD RECONSIDER THE INDICTMENT

The thrust of the grand jury testimony was that it was likely that Doris McDonald had died at or before 2:00 a.m. on December

16, 1977, and that therefore the petitioner had been present with her in the house when she met her death. Moreover, such testimony would indicate that petitioner must have lied when he told the poice that his wife was still alive shortly after 4:00 a.m. when he left for work. Given such testimony, it is hardly surprising that the grand jury voted to return an indictment charging petitioner with the murder of his wife.

Although the trial court strained to find that the variance between the testimony concerning time of death before the grand jury and petitioner was not radically different (App. p. 3a), and the appellate court reasoned that the grand jury testimony did not necessarily require the grand jury to conclude that petitioner was at home when his wife was slain (App. p. 28a), the difference in the inculpatory thrust of the testimony is patently obvious. It is unquestioned that the prosecutor conferred with the witness before trial and knew what

his trial testimony would be; thus, he obviously knew of the falsity of the grand jury testimony and materiality thereof.

It is petitioner's position, as a matter of federal constitutional law (Fourteenth Amendment Due Process), that it became the duty of the prosecutor, at the point that he became aware of the falsity of material grand jury testimony, to apprise the grand jury of the falsity in the testimony originally submitted to it so that it could reconsider the propriety of the indictment. Applicant's position finds support in several federal and state court decisions. See United States v. Guillette, 547 F.2d 743 (2d Cir. 1976); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Goldman, 451 F.Supp. 518 (S.D.N.Y. 1978); State v. Reese, 91 N.M. 76, 570 P.2d 614 (Ct.App. 1977).

In United States v. Basurto, supra, the prosecutor learned prior to trial that

a witness who testified before the grand jury had lied with respect to certain subject matter which may have influenced the nature of the indictment returned against the defendants. The prosecutor informed defense counsel about the perjury, but did not notify the court or the grand jury. Instead, the prosecutor proceeded to trial, revealing the fact of the witness' false grand jury testimony in his opening statement to the jury. Following conviction, the defendants appealed, and their convictions were reversed and the indictments dismissed by the United States Court of Appeals for the Ninth Circuit. The Court there ruled, at 497 F.2d 785-786:

> "We hold that the Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached. Whenever the prosecutor learns of any perjury committed before the grand jury, he is under a duty to

> immediately inform the court and opposing counsel - and, if the perjury may be material, also the grand jury - in order that appropriate action may be taken."

Although United States v. Basurto, supra, states the due process rule in terms of perjurious testimony adduced before the grand jury, the precursor decision of this Court upon which the Basurto rule was based, Napue v. Illinois, 360 U.S. 264 (1960), did not involve perjurious but rather merely false testimony. That case held that the knowing submission of false testimony by a prosecutor at a state trial invalidates the verdict of guilty under the due process clause of the Fourteenth Amendment.

The Court of Appeals of New Mexico, in State v. Reese, supra, held that the obtaining of an indictment based on false, rather than perjurious testimony is violative of a defendant's right to due process of law, where the prosecutor makes no efforts to correct the testimony upon learning of

its falsity. In reversing defendant's conviction the court stated:

> "The knowing use of false evidence or failure to correct false evidence at trial on the merits, is a violation of due process if the evidence is material to the guilt or innocence of the accused. Is this concept available to grand jury proceedings? Yes. Why? Under normal circumstances, the accused has no right to appear before that body, with or without counsel. Since he has no right concerning the grand jury except that it be duly impaneled and conducted according to law, his right in this respect should be rigorously protected. An indictment based on false, material evidence is not an indictment of a grand jury conducted according to law. We hold that defendant has the due process right of not being indicted on the basis of false evidence, known to and uncorrected by the prosecutor, if the false evidence is material to the indictment." State v. Reese, supra, 570 P.2d at 617.

In the present case, the inaccurate and misleading testimony of the county medical examiner concerning time of death effectively deprived the grand jury of

critical exculpatory evidence that may well have influenced the decision to indict. The grand jury was not informed that there was a large period of time, approximately five hours, when the murder may have occurred while petitioner was undeniably not at the murder scene. In this connection, many federal and state court decisions have held that the prosecutor has a duty to present exculpatory evidence to a grand jury. See United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979); United States v. Gold, 470 F.Supp. 1336 (N.D.Ill. 1979); United States v. Provenzano, 440 F.Supp. 610 (N.D.Okla. 1977); Frink v. State, 597 P.2d 154 (Alas. 1979); Johnson v. Superior Court, 15 Cal. 3d 248, 124 Cal. Rptr. 32, 539 P.2d 792 (1975). This duty also appears in the ABA Standards, The Prosecution Function, §3.6(b)(1971), as follows:

> "The prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt."

The basis for the imposition of a duty to present exculpatory evidence is succinctly expressed in United States v. Gold, supra, 470 F.Supp. at 1353:

> "When a prosecutor refuses to present exculpatory evidence, he, in effect, destroys the existence of an independent and informed grand jury."

The closest this Court has come to reviewing the issue raised herein is the decision in Bracy v. United States, 435 U.S. 1301 (1978) (Rehnquist, Circuit Justice), wherein applicants sought a stay of sentence following their conviction on various offenses, pending disposition of their petition for certiorari. Applicants alleged that a witness committed perjury before the grand jury that returned the indictment against them. Following revelation of the perjury at trial, applicants sought dismissal of the indictment, alleging that the prosecutor should have immediately informed them and the court when he became aware of the perjury.

The district court denied applicant's motion to dismiss, and the Ninth Circuit affirmed, United States v. Bracy, 566 F.2d 649 (9th Cir. 1977), distinguishing its earlier opinion in United States v. Basurto, supra. In Bracy, the perjurious testimony given before the grand jury implicated applicants in the offenses for which they were indicted, as did the corrected testimony at the trial. Thus, the grand jury was not deprived of any exculpatory evidence. United States v. Bracy, supra, 566 F.2d at 656. Moreover, that testimony was found to fall short of Basurto's requirement that the perjurious testimony before the grand jury be material, in the sense that it have some apparent connection to the grand jury's decision to indict.

In considering the application for a stay, Justice Rehnquist acknowledged that a prosecutor is under a duty to correct testimony given at a criminal trial that he knows to be false (even if not perjurious).

Bracy v. United States, supra, 435 U.S. at 1302. However, he went on to state that because the grand jury functions as an accusatory body in our system of criminal justice, it is concerned with the nature, and not the quality, of the evidence before it. Citing Costello v. United States, 350 U.S. 359 (1956), for the proposition that the evidence before the grand jury is not susceptible to challenge following the return of an indictment valid on its face, Justice Rehnquist denied the application for a stay.

It is not entirely clear from the opinion in Bracy whether Justice Rehnquist would conclude that the introduction of perjurious testimony that is material to the indictment returned would require a different result. Nor is it clear whether, if the corrected testimony revealed to the prosecutor prior to trial exculpated an accused, there would be a duty upon the prosecutor to return to the grand jury and

present the corrected version. Cf. Brady v. Maryland, 373 U.S. 83 (1963).

More fundamentally, Justice Rehnquist's opinion in Bracy, while focusing on the role of the grand jury, does not mention the independent duty of a prosecutor when he discovers prior to trial on an indictment that false material evidence was presented before the grand jury that returned that indictment. Nor does the opinion take into account this Court's observation in United States v. Dionisio, 410 U.S. 1, 16-17 (1973), that the mission of the grand jury "is to clear the innocent, no less than to bring to trial those who may be guilty."

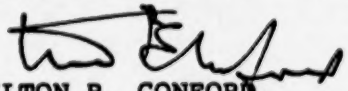
The instant case is one where clearly false testimony was presented to a grand jury, which relied upon that evidence in returning an indictment. The prosecutor was obviously aware of the falsity of that testmony before proceeding to trial. He elected to do nothing, although the corrected version was exculpatory of petitioner, and

may well have resulted in the grand jury reconsidering its decision to indict, had that information been presented to it.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,



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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS
SUPERIOR COURT OF NEW JERSEY

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RE: State v. Robert M. McDonald
Indictment No. 1371-76

Gentlemen:

This is the defendant's motion for a Judgment N.O.V., for a new trial, and for dismissal of the indictment following the conviction of murder in the second degree.

The defendant argues that the variance between Dr. Shuster's grand jury and trial testimony invalidates the indictment altogether. A parallel argument is that the state failed in its duty to apprise the defendant before trial that Dr. Shuster's testimony would be different than was forecast by his postmortem report and grand jury testimony.

I am satisfied of the following:

(a) The Shuster testimony at trial was that there was a period 8-18 hours before 5 P. M. on the day of death during which death occurred.

(b) Shuster's grand jury testimony is readable by the careful reader to circumscribe the same 8-18 hour period. The gist of his testimony, however, was that Dr. Shuster relied upon the rigor mortis index to place time of death at 12-18 hours before 5 P. M., and that he fixed 2 A. M. as the likely time of death by taking the mean time within that period.

(c) When he testified before the grand jury, Dr. Shuster was aware that a time of death later than the early morning hours would exculpate the defendant.

(d) Dr. Shuster did not distort or tailor his grand jury testimony to make his estimate of time of death earlier than indicated by his view of the scientific evidence.

(e) The variance between the grand jury and trial testimony was not due to any change of Dr. Shuster's mind, but rather by Mr. Corbin's choice of questions. Mr. Corbin was aware that two eminently qualified pathologists would testify for the defendant and that Dr. Shuster's opinion that death occurred at 2 A. M. would suffer by comparison with their conclusions that no such precise estimate could be made. He therefore dissipated the potential problem by steering questions away from it. He may have done so with Dr. Shuster's prior knowledge or without.

(f) The defendant was not prejudiced in his preparation for trial by not knowing in advance that Dr. Shuster's testimony would be less inculpatory than it was forecast to be.

On the basis of all of the above, I conclude that the indictment is not faulty. The witness did not lie in either forum. The basic factual material did not change, although its thrust did so. An indictment is not challengable after trial on the thesis that the grand jury may not have indicted if it had heard a focal witness's trial testimony. Similarly, this is not a case in which the State has notice that a witness will recant his trial testimony. Rather, it knew only that the State's trial counsel would try to keep the witness's testimony general and in harmony with the predicted testimony of the defense's superstar witnesses. That kind of tactical decision is a matter the State has no duty to share with the defendant before trial.

Another argument made by the defendant is that his conviction of second degree murder conflicts with the proofs and must be reversed. He argues that if he is guilty of anything it is first degree murder. Anything less must be a compromise.

Second degree murder was submitted to the jury without objection. Indeed, such an objection would have been fruitless, because the evidence was susceptible to a second degree murder conviction. The jury could have believed that the shot that hit the decedent's body was fired while she was yet upright, that the shot killed her, that

the later shots into her head were fired after she was dead, and that the body shot might well have been fired in anger, without reflection or without a deliberated plan to kill. In the alternative, the jury might have been fully convinced the defendant shot and killed his wife in anger but concluded that the lack of information before them about what preceded the shooting barred a finding of deliberation and premeditation.

There is another answer. A defendant who might well have been found guilty of one offense cannot complain that he was convicted only of a lesser included crime. If all of the elements of the greater offense were present, as the defendant suggests, he is not hurt by the jury's finding less than all of them. This conclusion may not be compelled by pure reason, but it is required in practice. If the conviction were reversed on this thesis, the defendant could not be retried. He could not be retried for first degree murder because he was once acquitted. He could not be retried for second degree murder because the reversal would establish that verdict as impermissible. Manslaughter would, for the same reason, be unavailable. Such a windfall result should not follow a jury's finding a defendant guilty of less than they might have done. The verdict is not invalid on this ground.

The defendant's major application is for a judgment of acquittal notwithstanding the verdict. The application must be granted unless there was sufficient evidence presented by the State to permit a jury

reasonably to conclude, beyond a reasonable doubt, that the defendant had murdered his wife.

There were a number of circumstances presented to the jury for consideration. From them the jury could reasonably have found

(a) The defendant was at home from about 8:30 p.m. to between 4:00 and 4:30 a.m. His wife came home at about the same time he did.

(b) The McDonald's relationship was strained by his health and concern for the future and his seeing another woman.

(c) At the time of her death, Mrs. McDonald had removed her outer dress but had not yet completed undressing for bed, or removing her jewelry.

(d) The wind-up alarm clock went off at 7:00 a.m. but was not shut off. If was allowed to run down. Most people turn their alarms off. This indicates death before 7:00 a.m.

(e) There was no evidence of break in, robbery or struggle. The first indication of violence is the defense wound in Mrs. McDonald's hand. The murderer was therefore someone whom Mrs. McDonald permitted in her bedroom without objection.

(f) Mrs. McDonald worked until about 8:00 p.m., with only half of a sandwich at about 4:45 p.m. When killed, she had stomach contents indicating she ate addi-

tional and different food when she got home. A reasonable time for that would be 8:30 to 10:00 p.m. The state of digestion makes it likely death occurred before 4:00 a.m.

(g) There is no imaginable other motive or person likely to explain the murder.

(h) It is not uncommon for a middle-class household to contain an unregistered handgun. It is not impossible for a person to dispose of one along the road at 4:30 or 5:00 in the morning or in a foundry later in the day.

The apparently exculpatory evidence disappears on close examination. The early morning speeding car was just a car in the street that was identified with the McDonald house only in retrospect. The absence of late-night lights as represented by a neighbor was not the result of directed observation. The defendant's reputation for good character does not weigh heavily against an isolated uncharacteristic explosion of emotion. The slept-in condition of the bed resulted from the couple's getting up during the night, as the defendant suggests might have happened, and the incident's occurring at that time.

Not one of the above-stated facts was proved beyond a reasonable doubt. All of them are matters the jury could reasonably have felt were probably true - true more likely than not. A collection of such matters can, by their numbers, combine to produce proof of guilt beyond a reasonable

doubt. In other words, enough circumstances that have been proved probably to exist can add up to proof beyond a reasonable doubt. The focal question in this trial was what time Mrs. McDonald died. If it was before the defendant left for work, he must have killed her, for no other conceivable explanation could be made. The circumstances presented to this jury were sufficient to permit them to conclude reasonably and beyond a reasonable doubt that Mrs. McDonald died before the defendant left the house.

The motions for judgment n.o.v. and for a new trial and for dismissal of the indictment are denied. The State will present an order.

The defendant will present himself for sentencing on Monday, July 9, at 9:00 A.M.

Very truly yours,

RICHARD S. COHEN
J. S. C.

RSC:ko

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4187-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT M. MC DONALD,

Defendant-Appellant.

Argued November 12, 1980 - Decided
December 4, 1980

Before Judges Matthews, Morgan
and Morton I. Greenberg.

On appeal from the Superior Court,
Law Division, Middlesex County.

Warren W. Wilentz argued the cause
for appellant (Wilentz, Goldman &
Spitzer, attorneys; Mr. Wilentz,
of counsel; E. James Mullaly, on
the brief).

Daniel Grossman, Deputy Attorney
General, argued the cause for respon-
dent (John J. Degnan, Attorney
General, attorney; William F. Lamb,
Deputy Attorney General, of counsel
and on the brief).

The opinion of the court was delivered by GREENBERG, J.A.D.

Defendant was indicted for the murder of his wife, Doris McDonald. N.J.S.A.

2A:113-1 and 2A: 113-2. After a jury trial he was convicted of murder in the second degree and was sentenced to a term of not less than twelve years or more than fifteen years. He appeals asserting as error various grounds to be discussed later.

The evidence produced on the State's case, a portion of which consisted of reading defendant's statements given the police, showed that defendant and decedent were married and in December 1976 were residing together at 26 Wilson Avenue in the Borough of Middlesex. They had three children but all were married and none were living at home. Although they had been married for many years there was friction in the marriage because of defendant's relationship with a woman from Florida named L. B. who was alleged to be a prostitute. Between three weeks and a month prior to December 16, 1976 defendant consulted an attorney concerning the institution of divorce proceedings. On the

evening of December 15, 1976 defendant and decedent were home from about 8:30 p.m. on. Defendant went to bed about 9:30 p.m. Defendant indicated that he awakened at 4:00 a.m. on December 16, 1976 and that his wife was awake at that time. He got up to go to work at a foundry he operated. The travel alarm in the McDonald bedroom was set for his wife for 7:00 a.m. Defendant left for work at about 4:15 a.m. The alarm was set because his wife was also employed and had to go to her job. When he left the house he locked the front door. He observed nothing unusual at that time. During the day he called L.B. in Florida. Defendant said the call was made before he knew of his wife's death.

Decedent's body was found at about 2:00 p.m. on December 16, 1976 in the following circumstances. On December 10, 1976 defendant and a neighbor, Linda Berger,[1] who resided at 29 Wilson Avenue

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[1] Berger is not the same person as L.B.

directly across the street from the McDonald's, made arrangements for Berger to accept delivery of appliances that defendant had purchased as a surprise for his daughter, Susan DeSantis. Subsequently it was agreed that Berger would go to Susan's house and receive the appliances there rather than at defendant's house. The delivery was made on the morning of December 16, 1976. Berger attempted to telephone decedent at her office after the delivery was made to tell her about it. Berger was advised by the person answering at the office that decedent had not come to work. Accordingly Berger called the McDonald residence but her calls were not answered even though decedent's car was in the driveway.

During the afternoon defendant called Berger to ascertain whether the delivery had been made. In the course of the conversation Berger told defendant of her unsuccessful attempts to reach decedent. Defendant then requested that Berger

call her again. When this call was not answered Berger again called defendant. Defendant then asked Berger to call a second married daughter, Barbara Shafer, and have her go to the McDonald house to see if her mother was there and if everything was all right. This call was made and as a result Shafer and decedent's sister, Janet Weinman, went to defendant's house around 2:00 p.m. Decedent's car was still in the driveway. The front door was locked but Shafer had a key. The women then unlocked the house and entered looking for decedent. They found her in her bedroom lying face down on the bed. She was wearing a winter-weight robe. There was a pillow covering her head. The bedroom was dark and the shades were drawn.

The police were immediately called and arrived shortly thereafter. In the ensuing investigation various observations were made. There were gunpowder marks and bullet holes observable on the pillow.

Bullet holes were discovered in the wall behind the bed and on the floor. The rest of the house was not disturbed. Two watches, $28 in currency and a roll of pennies were in plain view on a dresser in the bedroom. There was additional money in a closet. There was no indication that a robbery had been committed. Drawers in dressers were not pulled out or dumped. The travel alarm clock that defendant said had been set for 7:00 a.m. had run out. The doors and windows of the house were examined. They showed no signs of forcible entry. The bed in which decedent was found apparently had been slept in.

Defendant was called at his foundry and told what happened. He immediately returned home. He told the police he could see no signs of forcible entry and that nothing was missing. He then made two formal statements to the police after being advised of his Miranda[2] rights.

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[2] Miranda v. Arizona, 354 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The first was given at his house and the second was made at the Middlesex County Prosecutor's office. Their content has already been noted.

Decedent's body was removed to the morgue at Perth Amboy General Hospital. The body was preliminarily examined at 4:50 p.m. on December 16, 1976 by Chief Middlesex County Medical Examiner Marvin Shuster, M.D., a trained pathologist. Shuster performed a full autopsy on December 17, 1976. He determined that decedent had died from gunshot wounds. Two bullets were found in the body. He found no evidence of trauma to the victim's external genitalia. He noted that decedent was still wearing rings. Tests made for semen on her person and clothing by Special Agent Robert E. Beams of the Federal Bureau of Investigation were negative. Beam's tests of fingernail scrapings indicated the presence of human blood and a fibrous material but the sources were not ascertained.

Shuster also made an effort to establish the time of death. He testified both at the grand jury and at the trial with respect to this matter. Since an asserted conflict in his testimony on this point raises a question on this appeal we will recite it from both places though obviously the grand jury testimony cannot be used to support the verdict. Testifying before the grand jury Shuster said that decedent had been dead approximately fifteen hours when he first examined her on December 16, 1976. That put the time of death at 2:00 a.m. on that day, a time at which decedent and defendant were both in the house. Subsequently he told the grand jury that the time of death could have been five or six hours before 2:00 a.m. or three hours after 2:00 a.m. and thus between 8:00 p.m. on December 15, 1976 and 5:00 a.m. on December 16, 1976 and that decedent had been dead for at least eight hours when he initially examined her. Since the examina-

tion was made at 4:50 p.m. that meant that the time of death could have been as late as 9:00 a.m. At the trial Shuster said that decedent had died certainly more than eight hours before he saw her and somewhat less than eighteen hours before the examination.

No arrest was made immediately after the murder, however the case remained under active investigation. Additional evidence was uncovered. On February 27, 1977 defendant's son-in-law, Larry Shafer, was at defendant's house to move furniture. Defendant and Shafer discovered that there was a bullet hole in the clock radio next to the bed. Shafer indicated he would take the radio downstairs but defendant said not to do that but that he, defendant, would throw the radio out. Shafer later called the prosecutor's office and apparently advised that office of these events. The next day detectives from that office went through defendant's trash. The clock radio

with a bullet in it was found.

On March 10, 1977 Detective Joseph L. Zimmerman of the prosecutor's office questioned defendant about the clock radio at defendant's foundry in Irvington. Zimmerman knew that defendant was represented by counsel. He did not give defendant Miranda warnings but nevertheless defendant was found by the trial judge to have known that he was not required to discuss the matter with Zimmerman. Defendant said that Shafer threw out the clock radio. This evidence was admitted at trial.

Defendant did not testify at the trial but he did present evidence showing his good character and reputation for peaceful conduct. Gabriel Pinter, a neighbor of the McDonald's, heard a car making a lot of noise at about 6:10 a.m. or 6:15 a.m. near the McDonald house. It seemed to be accelerating. He did not actually hear it start up. Defendant also presented testimony from employees that established that he

arrived at the foundry no later than 5:00 a.m. and stayed there until he was called home after the body was discovered.

Additionally, defendant presented testimony from Martin J. Salwen, M.D., and Russell S. Fisher, M.D., both pathologists. Salwen testified that decedent probably died between eight and eighteen hours before Shuster's examination and thus between 11:00 p.m. on December 15, 1976 and 9:00 a.m. on December 16, 1976, though it was possible that she died more than eighteen hours earlier or up to five hours before the examination. Fisher said that when Shuster performed his examination the decedent had been dead at least six or eight hours and that she may have been dead eighteen or twenty hours.

At the outset of the trial, before jury selection, defendant asked the trial judge to rule on whether testimony concerning defendant's relationship with L. B. would be admissible. Defendant felt that such

testimony could be prejudicial and should thus be excluded. The State indicated that it would attempt to prove the existence of the relationship as one indicia of marital discord leading to the murder. The trial judge declined to rule on the evidence in advance of trial. Ultimately some evidence of the relationship was admitted; other evidence was excluded. During jury selection counsel requested that the judge question the panel about the effect of the relationship on their impartiality. The court complied and one juror was excused as a result.

During summation the prosecutor referred to defendant's conduct as being a "murder of hatred." Defendant did not object to the characterization.

Defendant appeals asserting the following points:

(1) The evidence adduced at trial was not sufficient to justify the trial court's denial of defendant's motion for acquittal.

(2) The trial court committed error by refusing to grant defendant a new trial.

(3) Defendant was brought to trial on an indictment known by the State to be founded upon critically false and misleading testimony, and the State's failure to inform the grand jury of this circumstance resulted in the deprivation of defendant's valued right to indictment by an informed and effective grand jury, requiring reversal of the conviction and dismissal of the indictment.

(4) The trial court erred by permitting the State to introduce at trial certain statements concerning a clock-radio made to a member of the prosecutor's staff during the course of interrogation.

(5) Defendant's objection to the introduction into evidence of his March 10 statement to Detective Zimmerman concerning a clock-radio is based on both constitutional and ethical grounds.

(6) The trial court abused its discretion by refusing to determine the admissiblity of the State's alleged motive evidence prior to the selection of the jury.

(7) The prosecutor in summation sought to have the jury infer a motive for defendant to murder his wife which was not based on the evidence adduced at trial, and the resultant prejudice to defendant requires reversal of the conviction.

(8) The State failed to prove a motive for defendant to murder his wife, and may not now urge that evidence erroneously admitted by the trial court for the purpose of establishing a motive theory subsequently abandoned by the State successfully establishes a motive for the murder that the State expressly disavowed during the trial.

Plainly the evidence presented required the trial court to deny defendant's motions for acquittal made at the time of the State's case, at the end of all the evidence and after the verdict. The test is whether viewing the State's case in its entirety and giving the State the benefit of testimony it has produced including the favorable inferences which could reasonably be drawn therefrom, whether the jury could find defendant guilty beyond a reasonable doubt. State v. Brown, 80 N.J. 587, 591 (1979); State v. Reyes, 50 N.J. 454, 458-459 (1967). Obviously the testimony against defendant was circumstantial but this fact does not change the rule. State v. Ray, 43 N.J. 19, 30-31 (1964); State v. Fiorello, 36 N.J. 80, 86-90 (1961), cert.

den. 368 U.S. 967, 82 S.Ct. 439, 7 L.Ed.2d 396 (1962). Here the evidence permitted the jury to find defendant guilty beyond a reasonable doubt. Indeed it is difficult to perceive of how the jury could not have concluded that defendant shot and killed his wife unless the jury was to engage in speculation. The medical evidence of the State showed that the death could certainly have occurred when defendant and decedent were both in the house. The alarm clock was not turned off at 7:00 a.m. This resulted in a permissible inference that death occurred prior to the alarm's ringing. There was no sign of forcible entry even though defendant had left the house locked when he went to work. Decedent's sister and daughter found the house locked when they arrived in the afternoon of December 16, 1976. Thus, if someone else entered the house through the front door and murdered decedent he was careful to lock it behind him when he entered (if

he left in some other way) or when he left if he went through that door. There was no indication of robbery. The jury could reasonably have believed that had a burglar committed the murder he would have taken the money and watches. Additionally, there was friction between the couple. Furthermore defendant attempted after the murder to conceal the evidence of the clock radio. Even if the radio itself would not have materially aided the investigation if defendant turned it promptly over to the police, his act of hiding it was rationally related to his mental state and the jury could reasonably draw the inference that he thought the evidence to be incriminating.

Also, we should not overlook the circumstances surrounding the discovery of decedent's body though the inferences to be drawn from them are more suggestive of first degree than second degree murder. Berger's testimony indicated that defendant had

arranged for the purchase of appliances for his daughter. It could be inferred from that testimony that he knew that the delivery was to be on December 16, 1976 because he called Berger in the afternoon of that day to ascertain if it had been made. When he called her, she advised him that she had not been able to reach decedent even though her car was visible in the driveway. If defendant had planned his wife's murder he could have foreseen that Berger would convey this information to him when he called because the proximity of the McDonald and Berger residences made it likely that someone from the Berger household would see, as indeed happened, decedent's car in the driveway. The Berger call to defendant triggerred the activity already described that led to the body being discovered. The significance of this is clear: if defendant planned to murder his wife the jury could have inferred that he would have wanted some third party

to find the body. While guilt would not have been per se established simply because decedent had come home and found his wife murdered, the jury had every right to believe that decedent's conduct, with respect to the delivery of the appliances, was highly suspicious and intended to divert suspicion from him.

We add, of course, that the inferences to be drawn from the evidence accumulated after the discovery of the murder are not necessarily inconsistent with the verdict of murder in the second degree. Quite to the contrary the jury could have reasonably concluded that the murder had not been planned before December 16, 1976 and that the delivery of the appliances on that date was coincidental. The jury could have concluded that defendant merely took advantage of the circumstances of the delivery of the appliances to make the call which resulted in the body being found.

Defendant's motion for a new trial was

properly denied. We fail to see any miscarriage of justice in the verdict. R. 2:10-1; State v. Sims, 65 N.J. 359, 373-374 (1974). Clearly the evidence supported the verdict. Further even defendant's experts' testimony placed the time of death as being within a period during which defendant was home. Surely it could not seriously be contended that simply because a neighbor heard a noisy car accelerating from the direction of the McDonald house that the jury could not believe that defendant was the murderer.

Defendant was not entitled to a new trial on the ground that the verdict was a compromise. Defendant asserts that while he was not the murderer, whoever did commit the homicide committed first degree murder. To establish that defendant had committed first degree murder, the State had to prove the additional elements of willfulness, premeditation and deliberation required to elevate the presumed second degree murder

to the first.[3] State v. Christener, 71 N.J. 55, 64-65 (1976). It is difficult to see why the jury, in the absence of an eye witness to the murder, had to conclude that defendant committed first degree murder. He was, after all, entitled to an acquittal of first degree murder unless the jury could find him guilty of that crime beyond a reasonable doubt.

We further note that the Supreme Court has recently disapproved the concept of an all or nothing verdict and has in fact indicated that on an indictment for first degree murder the trial court should charge second degree murder even if defendant does not want the charge, provided, of course, the evidence would permit such a verdict. State v. Powell, 84 N.J. 305, 318 (1980). This was such a case.

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[3] If the State proves beyond a reasonable doubt that a defendant committed murder there is a presumption that the murder was in the second degree. State v. Robinson, 139 N.J. Super., 475, 483-484 (App. Div. 1976).

Defendant's argument that the variance between the grand jury and trial testimony of Dr. Shuster requires a dismissal of the indictment is without merit. What defendant suggests is that the State presented false and misleading testimony to the grand jury. Our reading of the testimony shows that Dr. Shuster was not certain as to the time of death either at the trial or before the grand jury. The testimony presented at both times if believed permitted, but did not require, the grand jury and the trial jury to conclude that decedent had died before defendant left the home. The lack of definiteness in the testimony was consistent with the expert testimony of Drs. Salwen and Fisher, defendant's witnesses. A trial court should dismiss an indictment only for clear reasons. State v. Winne, 12 N.J. 152, 181-182 (1953); State v. Ferrante, 111 N.J. Super. 299, 304 (App. Div. 1970). There were no such reasons here.

Defendant's statement to Zimmerman was properly admitted. Defendant was not given Miranda warnings but they were not required since the interrogation was not custodial. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977); State v. Mann, 171 N.J. Super. 173, 177-178 (App. Div. 1979), certif. den. 82 N.J. 290 (1980). Nor was defendant denied counsel during the interrogation. Quite to the contrary, defendant knew that he did not have to answer any questions. Thus, when he answered he acted voluntarily. In these circumstances we do not see how his Sixth and Fourteenth Amendment right to counsel was infringed.

Even assuming that the statement was derived by unethical means, it was still properly admitted. DR 7-104(A)(1) does interdict direct communication with a party by opposing counsel if the party is himself represented but treating defendant as a party at the time of the pre-indictment

interrogation does not help him. The disciplinary rule does not include a built-in evidentiary exclusionary rule such as that dealt with in State v. Cerbo, 78 N.J. 595, 500-602 (1979). In the absence of such a rule the evidence should have been admitted. See Barbetta v. Sciaraffa, 135 N.J. Super. 488, 495 (App. Div. 1975). We are, of course, aware of the decision of the Supreme Court in State v. Sugar, 84 N.J. 1 (1980). Plainly the unethical and perhaps criminal conduct involving defendant's rights in Sugar was quite different from what happened here. Sugar involved eavesdropping on the confidential conversations between an attorney and client. Here the State did nothing underhanded.

The trial judge did not abuse its discretion in refusing to determine in advance of trial whether the State could prove the existence of defendant's relationship with L. B. to establish a motive for

the murder. We are aware of no rule that requires pretrial evidentiary hearings on all evidence to be offered. There are, of course, certain particularized situations where pretrial rulings are obtained. See, e.g., R. 3:5-7. There is a danger, however, in making pretrial rulings the general rule since it can result in pretrial evaluations of evidence that varies from the evidence eventually submitted at the trial itself.

We conclude that defendant suffered no prejudice from the way the trial court dealt with the issue. Indeed, defendant may have received a better disposition on the issue than he deserved because evidence relating to his relationship with L. B. went to motive. Thus we do not see why the State should not have been permitted to inquire into defendant's relationship with her. State v. Rogers, 19 N.J. 218, 228-229 (1955). Further, the juror who expressed possible prejudice as a result of the relationship was excused.

Defendant's objection to the prosecutor's summation, characterizing the homicide as a murder of hatred, is not substantial. We note that defendant did not object to this characterization in the trial court. On this basis alone defendant should be barred from raising the issue before us. State v. Farrell, 61 N.J. 99, 106-107 (1972). In any event, the remark was made to underscore the State's theory that the murder had not been committed by a robber or a rapist and thus the characterization was a fair comment. The jury could have justifiably believed that the decedent was killed by multiple gunshot wounds by a person intent only on murder and not some other crime. Further, the evidence supported a finding that defendant fired the bullets. In these circumstances defendant cannot claim prejudice from the summation.

Defendant is not entitled to an acquittal on the basis that the State

failed to prove motive. There is no question but that animosity between the parties was shown. Even if defendant committed the act for unknown reasons the verdict was proper on the basis of the evidence.

Affirmed.

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY
LAW DIVISION - CRIMINAL

Indictment No. 1371-76
Accusation No.
S.B.I. No.
DATE OF ARREST 6/30/77

THE STATE OF NEW JERSEY,

v.

ROBERT M. McDONALD,

Defendant.

JUDGMENT OF CONVICTION AND ORDER FOR COMMITMENT

The defendant on June 30, 1977 having entered a plea of not guilty to Indictment No. 1371-76 for the crime(s) of Murder, N.J.S. 2A:113-2 and the defendant having on April 30, May 1, 2, 3, 4, 7, 8, 9 BEEN TRIED with A JURY AND A verdict OF GUILTY TO: Murder - Second Degree, N.J.S. 2A:113-2 having been rendered on May 10, 1979

It is, therefore, on July 9, 1979 Ordered and Adjudged that the defendant be and is sentenced to New Jersey State Prison for not less than twelve (12) years nor more than fifteen (15) years. The sentence is stayed pending appeal. Bail is continued.

IT IS FURTHER ORDERED THAT THE SHERIFF DELIVER THE DEFENDANT TO THE AFORE-NAMED INSTITUTION TO SERVE HIS SENTENCE.

STATEMENT OF REASONS REQUIRED BY R.3:21-4(e) APPEARS ON THE REVERSE SIDE

ATTORNEY FOR DEFENDANT
Upon entry of Guilty Plea or Conviction

Defendant to receive R.3:21-8 credit for time spent in custody

Warren W. Wilentz, Esquire
At time of Sentencing

From 6/30/77 to
6/30/77 Days
credit one

Warren W. Wilentz, Esquire

County Clerk

Date

RICHARD S. COHEN,
J.S.C.

STATEMENT OF REASONS, R.3:21-4(e)

The killing of another human being without justification or excuse is an offense deserving of substantial condemnation by society expressed in a prison sentence. That is the primary focus of my sentence, and I believe it to be sufficient for that purpose. The act was a unique one in the defendant's life and neither rehabilitation nor individual deterrence is relevant.

July 9, 1979
Date

RICHARD S. COHEN, J.S.C.

SUPREME COURT OF NEW JERSEY
C-310 SEPTEMBER TERM 1980

STATE OF NEW JERSEY	:	
Plaintiff-Respondent,	:	
vs.	:	ON PETITION FOR CERTIFICATION
ROBERT M. McDONALD,	:	
Defendant-Petitioner.	:	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4187-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Mark A. Sullivan, Presiding, Justice, at Trenton, this 10th day of February, 1981.

Stephen W. Townsend
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-775

ROBERT M. McDONALD,

Applicant

v.

NEW JERSEY

O R D E R

UPON FURTHER CONSIDERATION of the application of counsel for the applicant and of the response filed thereto,

IT IS ORDERED that the temporary stay entered by the undersigned on March 12, 1981 is vacated and the application for bail is denied.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 20th
day of March, 1981

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

> Section 1. All persons born or

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member

of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

No. 80-1885

Office-Supreme Court, U.S.
FILED
JUN 11 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT M. McDONALD,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

JAMES R. ZAZZALI,
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Of Counsel and on the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

Questions Presented for Review

1. Since petitioner concedes that New Jersey's standard for judicial review of evidence adduced at trial accords with *Jackson* v. *Virginia*, 443 U.S. 307 (1979), should this Court grant *certiorari* simply to review evidence which the State courts correctly found to be legally sufficient to support petitioner's conviction for second degree murder?

2. Should this Court grant *certiorari* to review the factual circumstances of petitioner's failure to avail himself of retained counsel's presence at a non-custodial investigative interview?

3. Since the State courts found that the prosecutor did not falsify grand jury expert testimony, and since the relevant law is undisputed, should this Court grant *certiorari* simply to find facts where the grand jury testimony at issue was less favorable to petitioner than the trial testimony and where he had discovery and had the opportunity to cross-examine at trial but chose not to do so?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Introduction	2
B. The Doris McDonald murder investigation	2
C. The grand jury proceedings	11
D. Trial	12
E. Petitioner's post-trial motions to overturn the jury's verdict	14
REASONS SUPPORTING DENIAL OF CERTIORARI:	
Point I—Since the evidence against petitioner was overwhelming, since petitioner concedes that the evidence adduced against him was "largely undisputed," and since he also concedes that the New Jersey trial court and appellate court reviews were undertaken pursuant to the proper constitutional standard, denial of certiorari is proper	16
Point II—Petitioner's non-custodial statement to a police detective was properly admitted into evidence	20
A. Introduction	20

PAGE

B. There is no right to counsel before the institution of adversarial proceedings or at a non-custodial interview 22

C. Petitioner's claim of due process violation was not advanced at the appellate level, but if it was preserved, no violation is evident 24

D. Petitioner waived counsel's presence at the interview 25

Point III—Petitioner's motion to dismiss the indictment for prosecutorial misconduct was properly denied and presents no issues for certiorari 26

CONCLUSION 30

Cases Cited

Ashwander v. T.V.A., 297 U.S. 288 (1936) 17

Edwards v. California, —— U.S. ——, —— 49 U.S.L.W. 4496 (May 18, 1981) 22

Flast v. Cohen, 392 U.S. 83 (1968) 17

Jackson v. Virginia, 443 U.S. 307 (1979) .....i, 16, 17, 20

Kirby v. Illinois, 406 U.S. 682 (1972) 23

Miranda v. Arizona, 384 U.S. 436, reh. den. 385 U.S. 890 (1966) 6, 9, 11, 12, 21, 22

North Carolina v. Butler, 441 U.S. 369 (1979) 25

Oregon v. Mathiason, 429 U.S. 492 (1977) 22

People v. Merkel, 23 Ill. App. 3d 298, 319 N.E.2d 77 (App. Ct. 1974) 25

PAGE

Powell v. Alabama, 287 U.S. 45 (1932) 23

Rhode Island v. Innis, 446 U.S. 291 (1980) 22

State v. Brown, 80 N.J. 587, 404 A.2d 1111 (1979) 16

State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962) 9

State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972) 9

State v. Melvin, 65 N.J. 1, 319 A.2d 450 (1974) 9

State v. Reyes, 50 N.J. 454, 236 A.2d 385 (1967) 16

United States v. Calandra, 414 U.S. 338 (1974) 26

United States v. Henry, —— U.S. ——, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980) 23

United States v. Masullo, 489 F.2d 217 (2 Cir. 1973) 25

United States v. Morrison, —— U.S. ——, 101 S.Ct. ——, 66 L.Ed.2d 564 (1981) 23

United States v. Thomas, 474 F.2d 110 (10 Cir. 1973), cert. den. 412 U.S. 932 (1973) 24

Winship, In re, 397 U.S. 358 (1970) 17

United States Constitution Cited

Sixth Amendment 22-24

Fourteenth Amendment 22, 24

Rules Cited

Rule 17.1 20

Rule 22.1 1

Rule 34.2 1

No. 80-1885

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT M. McDONALD,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

Jurisdiction

Constitutional Provisions Involved

Respondent accepts petitioner's statements of the above-captioned items in accordance with *U.S.Sup.Ct. R.* 34.2, incorporated by reference in *U.S.Sup.Ct. R.* 22.1.

Statement of the Case

A. Introduction

During the early afternoon of December 16, 1976, the body of 54 year old Doris McDonald was discovered in the bedroom of her residence in suburban New Jersey. Mrs. McDonald had been shot a number of times. No witnesses to the murder were ever located, nor did anyone confess to the crime. Nevertheless, a compelling set of circumstantial proofs ultimately led a trial jury to the inexorable conclusion that Doris McDonald's murderer was her husband, petitioner herein.

B. The Doris McDonald murder investigation.

Petitioner and Doris McDonald were married for 34 years and had three grown daughters, Barbara McDonald Shafer, Susan McDonald DeSantis and Jeanne McDonald Katz. At the time in question, the couple lived in a one-family house. Petitioner was part owner of a small foundry located in another town while Mrs. McDonald was employed as a sales representative for a concern located elsewhere. Petitioner was also suffering from what was then believed to be terminal cancer.

On December 10, 1976, petitioner and a neighbor named Linda Berger made arrangements for her to accept delivery of some appliances that petitioner had purchased for his daughter Susan (2T35-12 to 17).[1] Two days later,

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[1] TGJ refers to the transcript of grand jury proceedings conducted on June 23, 1977.
T refers to the transcript of trial, April 30, 1979.
2T refers to the transcript of trial, May 1, 1979.

(Footnote continued on following page)

petitioner asked Mrs. Berger if she would direct the deliverymen to Susan's house rather than accept delivery herself. When Mrs. Berger agreed, petitioner gave her the keys to Susan's house and a gratuity for the delivery men (2T37-18 to 2T38-7).

During the morning of December 15, Mrs. Berger superintended the delivery of the appliances (2T38-15 to 23). Upon her return from Susan's house, Mrs. Berger attempted to reach Mrs. McDonald in order to inform her that the appliances had been delivered. When she called her office, however, she was advised that Mrs. McDonald had not come to work that morning (2T40-17 to 20). Although Mrs. McDonald's gold automobile was parked in the driveway of the McDonald home, telephone calls to the residence went unanswered (2T39-11 to 18; 2T40-6 to 12). Early that afternoon, petitioner called Mrs. Berger to ask about the delivery (2T40-4 to 8). Mrs. Berger confirmed the delivery and informed petitioner that she had been unable to reach Mrs. McDonald either at home or at work. Petitioner thereupon asked her to try again. Shortly thereafter, Mrs. Berger called petitioner to advise him that there was still no answer to telephone calls

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(Footnote continued from preceding page)

3T refers to the transcript of trial, May 2, 1979.
4T refers to the transcript of trial, May 3, 1979.
5T refers to the transcript of trial, May 7, 1979.
6T refers to the transcript of trial, May 9, 1979.
7T refers to the transcript of acquittal motion, May 8, 1979.
8T refers to the transcript of summations and the jury instructions, May 9, 1979.
9T refers to the transcript of trial, May 9, 1979.
10T refers to the transcript of trial, May 10, 1979.
TM refers to the transcript of post-trial motions, June 15, 1979.
2TM refers to the transcript of motion, June 28, 1979.
TS refers to the transcript of sentencing, July 9, 1979.

placed to the McDonald home (2T40-13 to 16; 2T40-21 to 24). Petitioner then requested that Mrs. Berger call his daughter Barbara to have her check the house (2T40-25 to 2T41-3).

Shortly after 2:00 p.m., Barbara and her aunt, Janet Weinman, arrived at the McDonald residence and noted the continued presence of Mrs. McDonald's automobile (2T41-4 to 22; 2T50-6 to 25). After Barbara unlocked the front door, the two women went through the house (2T51-1 to 17; 2T59-6 to 20). They discovered the victim in the upstairs bedroom (2T51-18 to 2T52-6).

Mrs. McDonald, clad in a heavy red winter robe, was found lying on her stomach across the bed. Since the bedroom was darkened and the shades were drawn, Mrs. Weinman turned on a hallway light. She then returned to the bedroom and removed a pillow which covered Mrs. McDonald's head. Mrs. Weinman then instructed Barbara to telephone the rescue squad (2T52-7 to 2T54-16; 2T59-21 to 2T61-3).

First to respond to the call from the McDonald residence was local police officer John Haverstick whom Barbara directed to the bedroom (2T65-24 to 2T66-25; 2T72-14 to 21). Patrolman Haverstick observed Mrs. McDonald lying on the bed and a pool of already coagulating blood beneath her nose and mouth. The officer also noted a puncture type wound under Mrs. McDonald's left ear lobe (2T73-4 to 15). The victim's body appeared stiff, and the officer was unable to detect a pulse (2T74-17 to 20). At that point, Patrolman Haverstick ushered the women from the bedroom and contacted the police (2T74-20 to 2T75-2).

At approximately 2:30 p.m., Captain William Potynsky arrived and directed that the crime scene be preserved.

He then took steps to notify the County Prosecutor's Office (2T97-17 to 2T93-9; 2T94-10 to 2T95-2). Meanwhile, petitioner and other members of the family contacted by Mrs. Weinman began arriving at the house and congregating downstairs (2T63-1 to 2T64-7; 2T119-1 to 2T121-6; 3T72-9 to 3T73-5).

Within 30 minutes, detectives from the county prosecutor's office had responded and noted that Mrs. McDonald's body was lying face down across the bed with her arms tucked underneath her stomach (2T32-11 to 14; 3T85-3 to 7). Further examination of the body revealed that the victim was wearing a watch and several rings (3T122-4 to 7; 3T122-24 to 3T123-4). Gunpowder marks were visible on the pillow which lay beside the body and several apparent bullet holes were present in it (2T135-2 to 9; 3T85-9 to 10).

Various articles appeared on each of two nightstands, one located on each side of the bed (2T95-15 to 22). On one, which bore what was then thought to be only a pre-existing scuff mark or indentation, was a digital clock/radio which was in good working order (2T96-15 to 16; 3T95-20 to 3T97-1). On the other was an opened *TV Guide* and a small travel alarm which still gave the correct time (3T97-18 to 3T98-18). Subsequent examination of the travel alarm disclosed that the alarm mechanism had been set for seven o'clock and that the alarm itself, the alarm lever of which remained at the "on" position, had been allowed to run out (3T98-19 to 3T99-16; 3T121-4 to 22).

The bedroom in general appeared entirely undisturbed, and no signs of a struggle between the victim and her assailant were evident (2T132-4 to 2T133-5; 3T93-3 to 11). Jewelry as well as two expensive wristwatches were in open view on a dresser (2T133-7 to 8; 3T93-12 to 13;

3T121-22 to 3T122-4). Also lying atop the dresser were a roll of pennies and approximately $28 in currency (2T133-6; 3T93-13 to 14), while a small television set rested undisturbed on its stand opposite the bed (2T133-3 to 5). Finally, $20 in currency, a shoe box full of pennies and a twelve gauge, single-shot Stevens shotgun were discovered in the bedroom closet (2T133-13 to 15; 3T93-15 to 19). Visual examination of the room revealed no indications of a burglary and no fingerprints were obtained from dusting various articles located within it (2T76-12 to 2T77-20; 3T93-3 to 19; 3T94-5 to 3T95-19).

While the investigation continued upstairs, Detectives Joseph Zimmerman and Anthony Tauriello checked the doors and windows of the house for signs of a forced entry. There were none (3T35-1 to 5; 3T68-21 to 3T70-8; 3T135-24 to 3T136-10). Petitioner also advised the detectives that nothing appeared to be missing from the house (3T36-6 to 13; 3T69-18 to 25).

While the local police officers canvassed the neighborhood for clues or information bearing on the crime, the prosecutor's detectives began interviewing those members of the McDonald family present at the scene. Prior to any questioning, petitioner was advised of his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436, reh. den. 385 U.S. 890 (1966). He signed a *Miranda* warning card. Petitioner also gave the detectives written authorization to take the shotgun (2T137-8 to 16; 2T171-11 to 2T173-16).

Petitioner then outlined his whereabouts and activities from approximately 5:30 p.m. the previous evening. In this regard, petitioner related that he had arrived home from work between 5:30 and 6:00 p.m. and that he had then attended a dance recital involving his grandchildren with his sister-in-law Janet Weinman (2T137-17 to 2T138-1). Petitioner returned home at approximately 8:00 p.m. His

wife arrived home appoximately thirty minutes later (2T 138-2 to 10). The two conversed for a time thereafter before petitioner went to bed at 9:30 p.m. (2T138-11 to 15). Petitioner arose for work at 4:00 a.m. the following morning (2T138-16 to 20). As he prepared to leave, he roused is wife and spoke briefly with her concerning whether she would be working overtime again that evening (2T138-21 to 2T139-2). Petitioner then checked his wife's alarm to make sure it was set to awake her at 7:00 a.m. (2T139-3 to 6). Petitioner had left the house and departed for work by 4:15 a.m. (2T138-21).

After this interview concluded, petitioner accompanied the investigating officers to the County Prosecutor's Office where he was again administered the *Miranda* warnings. Petitioner then agreed to give a formal statement (T173-17 to T174-20; 2T139-7 to 2T140-13; 3T19-77 to 3T20-15).

After providing certain biographical data, petitioner chronicled his activities in a fashion essentially consistent with the account he had rendered at the scene of the crime (3T22-4 to 3T25-12). As before, petitioner related that he had gone to bed at 9:30 p.m. the previous evening. His wife was also in bed at that time but watching television (3T25-13 to 19). During the night, petitioner sensed his wife getting up to use the bathroom. At an unascertained time thereafter, petitioner also arose to use the bathroom (3T26-10 to 22).

Petitioner then repeated his account of his early morning activities, alluding to the brief conversation with his wife and the checking of her alarm to make sure it was set for 7:00 a.m. (3T26-23 to 3T28-7). Petitioner noticed nothing unusual as he was leaving the house, closing and then checking the front door to ensure that it had locked behind him (3T28-17 to 3T29-1). Petitioner then drove to work, arriving at the foundry shortly before 5:00 a.m. (3T29-2 to 12).

Petitioner thereupon recalled his telephone conversations of that afternoon with Linda Berger and the call he had subsequently received from Janet Weinman informing him of his wife's death (3T30-5 to 3T31-5). Petitioner had then been driven home by his business partner (3T31-6 to 10).

In the ensuing portion of his statement, petitioner revealed that difficulties had recently arisen in his marriage. After a series of "heated arguments" with his wife, petitioner had consulted an attorney about divorce and had paid him a retainer approximately three weeks to one month prior to the murder. At that point, however, petitioner's relationship with his wife began to improve, and no proceedings were instituted (3T31-17 to 3T32-14).

Petitioner further related that the friction in his marriage stemmed from his relationship with a Miami Beach woman named Lisa Boffman and dated from a July 1976 confrontation between Ms. Boffman and his wife at a hospital where petitioner had been recuperating from surgery. Petitioner also disclosed that he had spoken to Ms. Boffman on the telephone earlier that afternoon prior to receiving word of his wife's death (3T32-15 to 3T34-11).

Petitioner could give the officers no reason why anyone he knew would have wanted to kill his wife. She was "very well liked." (3T34-15 to 20). Prior to her death Mrs. McDonald had not commented about any strangers coming to the house (3T34-21 to 25). Petitioner thereupon acknowledged that he had toured the house with Detective Taurello inspecting the windows and doors and had found "absolutely nothing" which might have suggested a forced entry (3T35-1 to 5). Nor was he aware of anything missing from the house (3T35-6 to 13). Petitioner then closed his statement by agreeing to bring any further information he might later discover or word of anything missing from his house to the investigators' attention (3T36-2 to 10).

At the conclusion of his formal statement, petitioner underwent a polygraph examination.[2] As before, this examination was preceded by a recital and waiver of the *Miranda* rights (T174-21 to T175-8). An investigator drove petitioner to his brother's home (2T102-13 to 20).

While the foregoing was in progress, the body of Doris McDonald was removed to the morgue at Perth Amboy General Hospital (4T38-2 to 4T39-3). A preliminary examination of the body was conducted by Dr. Shuster at 4:50 p.m. that afternoon. A full autopsy performed the following morning revealed no evidence of sexual assault (3T102-21 to 3T106-19; 4T48-16 to 18).

No further developments in the investigation are evident until February 27, 1977. On that date, Larry Shafer

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[2] Petitioner objected to mention of this fact in respondent's papers in opposition to petitioner's application for bail pending *certiorari*. Petitioner objected on the ground that no evidence of the polygraph administration was presented to the jury. This, of course, is true. However, the trial judge knew of the examination, as is noted above in text. In the totality of the circumstances, it is respondent's position that since administration of the examination was preceded by *Miranda* warnings, the giving of the warnings occurred in an atmosphere in which petitioner's sensitivity to his rights must be said to have been enhanced. It helps to place his subsequent course of cooperation with the police in context.

No inference may be drawn from the giving of the test. A polygraph test and its results are not admissible in New Jersey at trial unless there has been a prior stipulation by both parties, regardless of whether the results are favorable to the accused. *State* v. *Melvin*, 65 N.J. 1, 16-17, 319 A.2d 450, 456-459 (1974); *State* v. *McDavitt*, 62 N.J. 36, 46, 297 A.2d 849, 854 (1972); see *State* v. *Driver*, 38 N.J. 255, 262 183 A.2d 655, 854 (1962). Hence, it is not inferable that the polygraph in this case reached a conclusive result, much less that it was favorable or unfavorable to petitioner.

and Bill DeSantis proceeded to the McDonald residence to help their father-in-law clean up the bedroom wherein Mrs. McDonald had been murdered (5T3-20 to 5T4-16). Before the two men began moving the furniture, petitioner called their attention to a mark on the surface of one of the nightstands (5T4-17 to 5T5-3). Petitioner then picked up the digital clock/radio which rested atop it, shook his head and muttered, "Oh, boy." (5T5-4 to 7). After petitioner had placed the clock/radio back on the nightstand, Shafer lifted the clock/radio back up and noted what appeared to be a bullet hole in its underside. He then placed it back down without comment and commenced moving furniture out of the bedroom (5T6-2 to 17; 5T9-16 to 5T10-25).

Sometime thereafter, Shafer wrapped up the cord of the clock/radio and placed in a wastebasket which he in turn put in a dresser drawer. Upon observing Shafer's action, petitioner asked him what he was going to do with the clock/radio. When Shafer replied that he was going to take it downstairs, petitioner said, "No, leave it here. I'm going to throw it out." Shafer thereupon removed the clock/radio from the wastebasket and placed it on the floor (5T6-18 to 5T7-7; 5T12-25 to 5T13-12).

That evening, Shafer contacted Detective Zimmerman to inform him of the incident (3T38-24 to 3T39-7; 5T7-11 to 20; 5T13-16 to 19). The detective thereupon made arrangements to retrieve the trash that petitioner would be putting out the next morning. As expected, the trash from the McDonald residence included the clock/radio (2T104-13 to 2T105-14; 3T38-8 to 3T41-1). And when subsequently dismantled, the clock/radio yielded a spent bullet (2T106-4 to 15; 3T41-10 to 18; 3T132-13 to 3T 134-1).

On March 10, 1977, Detective Zimmerman visited the foundry to ask petitioner certain questions about the bed-

room (T175-9 to T177-17; 3T42-5 to 12). The Detective did not recite the full *Miranda* warnings; he merely advised petitioner, as he had during previous such interviews, that petitioner was not obligated to speak to him. Petitioner, in turn, voiced no objection to responding to Detective Zimmerman's inquiries. Subsequently, when asked what had become of the clock/radio, petitioner told the detective that his son-in-law Larry Shafer had thrown it out while cleaning the bedroom (T178-14 to 21; 3T 42-19 to 3T43-17).

C. The grand jury proceedings.

On June 23, 1977, the county grand jury convened to consider the evidence developed in the Doris McDonald murder investigation. The evidence adduced included a general narration of the foregoing events and statements.

The grand jurors considered the testimony of the County Medical Examiner, Dr. Shuster. On the basis of factors observed during his preliminary examination of the body as well as his autopsy findings, Dr. Shuster estimated the time of death at 2:00 a.m. on December 16 (TGJ23-6 to 14). Because of the lividity of the body, the doctor indicated that the victim had been dead a minimum of eight hours prior to the preliminary examination conducted shortly before 5:00 p.m. that date (TGJ23-15 to TGJ24-2). The rigidity of the victims limbs at that time suggested that the death had most likely occurred within the previous twelve to eighteen hours; the median of this figure, or 15 hours, provided the 2:00 a.m. estimate (TGJ24-3 to 22). Dr. Shuster then acknowledged that a "good estimation" of Mrs. McDonald's death would vary between five to six hours prior to 2:00 a.m. to three hours after that time (TGJ24-8 to TGJ25-7).

D. Trial

Trial commenced with a *Miranda* hearing to determine the admissibility of petitioner's March 10, 1977 statement regarding the clock/radio. Upon considering the testimony of both Detective Zimmerman and petitioner, the court concluded that petitioner, "a person of more than usual alertness," had been fully aware of his constitutional rights at the time of the contested interview and had knowingly and voluntarily spoken to the detective. Accordingly, petitioner's March 10 statement was held admissible (2T14-6 to 2T17-20).

Linda Berger, Janet Weinman and Patrolman Haverstick recounted the events which had led to the discovery of the victim's body. See generally (2T35-22 to 2T42-15; 2T49-15 to 2T57-9; 2T64-25 to 2T77-20; 2T82-7 to 14). Investigators then elaborated on those aspects of the crime scene investigation which negated the likelihood that Mrs. McDonald had been murdered by a burglar or other intruder. See, *e.g.*, 3T70-2 to 8—doors to McDonald house in good condition; 2T117-19—back door locked when inspected; 3T68-21 to 3T70-8 and 3T136-8 to 10—windows and doors to residence checked and no signs of a forced entry apparent; 3T136-2 to 4—interior of house gave no indication of being disturbed or ransacked; 2T97-22 to 24 and 2T133-1 to 5—bedroom also undisturbed and no evidence of a struggle between victim and her murderer; 3T93-12 to 14 and 3T133-6 to 8—money, jewelry and expensive wristwatches in open view atop bedroom dresser left untouched, and 3T69-21 to 22—nothing ever reported missing from the house.

These witnesses, as well as petitioner's statement to the investigators, established that the victim had been alone with petitioner after 8:30 p.m. on December 15, 1976. And

no one else had ever seen her alive after that. Furthermore, while Dr. Shuster placed the outer limits of Mrs. McDonald's death at 11:00 p.m. that evening and 9:00 a.m. the following morning (4T65-2 to 4T66-24), the jury was also informed that the 7:00 a.m. call of the victim's travel alarm had gone unheeded. (See 3T98-5 to 3T99-15; 3T121-5 to 21).

Although petitioner's formal statement to the investigators contained the claim that his relationship with the victim had recently begun to improve, this same statement included reference to the "heated arguments" the couple had engaged in shortly before. It further proved that their marital situation only three weeks to one month before Mrs. McDonald's murder had reached a point where petitioner was consulting an attorney about divorce. (See 3T31-17 to 3T32-14). The statement disclosed petitioner's ongoing affair with Lisa Boffman (3T33-15 to 3T33-14). Additionally, petitioner's statement suggested no other likely candidate for Mrs. McDonald's murder since "everybody liked [his] wife. She was a good person." (3T34-15 to 20).

Finally, Larry Shafer and Detective Zimmerman chronicled petitioner's attempt to dispose of the clock/radio and that (5T3-20 to 5T13-9) petitioner had subsequently lied about the matter to Detective Zimmerman, claiming that Shafer had thrown the clock/radio out (3T38-24 to 3T43-17; 5T3-20 to 5T13-9).

The parties stipulated that the murder weapon was a .32 caliber handgun of unknown origin (5T38-11 to 5T39-4), and the State rested. Petitioner then moved for a judgment of acquittal and for dismissal of the indictment, the latter motion premised on an alleged divergence in the estimated time of death given by Dr. Shuster before the grand jury and at trial. The applications were denied. (See 5T35-14 to 5T37-3).

The defense proofs subsequently included the testimony of various co-workers who placed petitioner at the company foundry on December 16 from approximately 4:45 a.m. onward (5T39-20 to 5T48-9); character witnesses (5T48-8 to 5T49-9 and 6T6-18 to 6T14-15); a neighbor who recalled hearing an automobile accelerating away from the vicinity of the McDonald house at approximately 6:30 a.m. on December 16 (6T2-11 to 6T4-15); medical experts who faulted the methods utilized by Dr. Shuster in determining the approximate time of the victim's death (4T87-8 to 4T93-9; 6T23-14 to 6T30-12) but did not seriously differ with his estimation (4T93-10 to 4T95-1; 6T30-13 to 6T31-4); and a former prosecutor's detective who noted what he perceived as shortcomings in the official investigtion of the crime (6T59-13 to 6T64-22). The case for the defense concluded with the reading of a deposition by the unavailable Jeanne McDonald Katz which outlined various of her mother's habits (6T81-25 to 6T89-25). Thereafter, the court denied a renewed motion for entry of a judgment of acquittal. (See 7T22-21 to 7T24-10).

In its closing argument to the jury, the defense contended, among other things, that the prosecution had demonstrated no motive for petitioner to have committed the crime and suggested that it was the work of a burglar (8T16-11 to 8T18-16). After recounting the proofs which dispelled this hypothesis, the prosecutor subsequently described Mrs. McDonald's slaying as "a murder of hatred" (8T38-12).

E. Petitioner's post-trial motions to overturn the jury's verdict.

Petitioner moved for judgment NOV and to dismiss the indictment on the ground of false and misleading testimony regarding the estimated time of the victim's death

allegedly rendered by Dr. Shuster before the grand jury. A hearing to explore this latter allegation was subsequently conducted by the trial court on June 28, 1979.

At that time, the State's trial attorney testified that he considered Dr. Shuster's trial testimony concerning the estimated time of the victim's death to have been consistent with that imparted before the grand jury (2TM10-8 to 21; 2TM15-20 to 2TM16-12). Nor had he been aware of any change in the doctor's opinion on this subject prior to trial (2TM10-22 to 2TM11-5).

Dr. Shuster then testified that his opinion concerning the outer limits of the time of death estimate was no different today than it had been initially (2TM19-8 to 20). The doctor recalled his testimony before the grand jury and perceivd no conflict between it and the eight to eighteen hour time span he had later related at trial (2TM19-21 to 2TM20-5).

When subequently pressed on this point by the defense, Dr. Shuster specifically referred to that portion of the grand jury transcript (TGJ23-22 to TGJ24-2) which confirmed that he had stated that Mrs. McDonald had been dead for a minimum of eight hours prior to the preliminary examination of her body conducted shortly before 5:00 p.m. on December 16, 1976 (2TM25-13 to 2TM26-17). Subtracting eight hours from 5:00 p.m. put one outside limit of the estimated time of death provided the grand jurors at the same 9:00 a.m. figure given at trial (2TM26-18 to 25). The doctor adhered to his grand jury opinion that the more probable time of death had been three hours either way of 2:00 a.m. He recalled that he had not been asked for this more precise estimation during the trial (2TM27-1 to 24).

By letter opinion dated July 2, 1979, the trial court denied the defense motions. (App. 6 to App. 10). One week later, the court sentenced petitioner to a term of 12 to 15 years in New Jersey State Prison (TS5-21 to TS7-18; Da2 to Da3).

REASONS SUPPORTING DENIAL OF CERTIORARI

POINT I

Since the evidence against petitioner was overwhelming, since petitioner concedes that the evidence adduced against him was "largely undisputed," and since he also concedes that the New Jersey trial court and appellate court reviews were undertaken pursuant to the proper constitutional standard, denial of certiorari is proper.

Petitioner's contention is that his conviction is based on inadequate evidence. He concedes nevertheless that such evidence as respondent introduced was "largely undisputed." (Petition, p. 19). He also concedes that the New Jersey standard for judging and reviewing a motion for judgment of acquittal at the end of the prosecution's case and at the end of the entire case is functionally equivalent to the standard this Court has mandated in *Jackson* v. *Virginia,* 443 U.S. 307, 319-20, 324 (1979). See *State* v. *Brown,* 80 N.J. 587, 591, 404 A. 2d 1111, 1113-1114 (1979); *State* v. *Reyes,* 50 N.J. 454, 458-59, 236 A. 2d 385, 387-88 (1967) (Petition, pp. 18 to 19).

Petitioner's complaint is nothing more than one of improper fact-finding. Although he suggests that *Jackson* v. *Virginia, supra,* is "relatively recent and the State courts are uniformly concerned with what type of evidence-weighing process that decision will require . . .," (Petition, p. 25), it is evident that the New Jersey courts have had years of experience weighing evidence in criminal cases under a standard petitioner concedes to be essentially identical (Petition, pp. 18 to 19) and therefore not at issue.

He further suggests that "guidelines" are necessary to aid State appellate courts and the Federal District Courts in judging *Jackson* allegations. However, he makes no attempt to formulate such guidelines. Given the factual posture of this case, it is respondent's position that "guidelines" would be inappropriate. The proofs of petitioner's guilt are ample. Moreover, this Court has repeatedly recognized that application of the standard of proof beyond a reasonable doubt is engrained in common law jurisprudence. *E.g., Jackson, supra; In re Winship,* 397 U.S. 358, 361-64 (1970). At this point in judicial history "guidelines" would do little but confuse that which is well-established. Any other path would lead to establishment of rules of circumstantial evidence as matters of federal constitutional law.

As to District Court judgments on habeas corpus petitions, obviously, Petitioner has no standing to raise the issue since this is not such an application. Any guidance will be purely advisory. See, *e.g., Flast* v. *Cohen,* 392 U.S. 83, 95-98 (1968); *Ashwander* v. *T.V.A.,* 297 U.S. 288, 346-48 (1936) (Brandeis J., concurring).

Furthermore, the record is sufficiently compelling to conclude that Petitioner murdered his wife; and that that review under a *Jackson* standard, which the courts of New Jersey concededly performed, can lead to no other conclusion. That Doris McDonald was murdered was beyond dispute; the only issue to be resolved was the identity of her killer.

Petitioner's formal statement to the investigators alerted the jury to the fact that petitioner and his wife had engaged in some "heated arguments" in the recent past. Although the statement contained the claim that their relationship had begun to improve, it was nonetheless true that petitioner had consulted an attorney about di-

vorce only three weeks to one month prior to his wife's murder. At the time of the killing, moreover, petitioner was pursuing an extramarital affair with another woman. These circumstances, it must be noted, form a not unfamiliar backdrop to murder.

Expert medical testimony placed the time of Doris McDonald's death between 11:00 p..m. on December 15 and 9:00 a.m. on December 16. The autopsy results and the fact that the victim's travel alarm was allowed to run out, however, strongly suggested that she was dead prior to 7:00 a.m. It was, of course, uncontested that petitioner and the victim were home alone together from 8:30 p.m. on December 15 until after 4:00 a.m. the following morning. Thus, it is clear that petitioner had ample opportunity to kill his wife.

The evidence negated the likelihood that Doris McDonald was killed by a burglar or other intruder after petitioner had left that morning. In his statement, petitioner acknowledged observation of nothing unusual in the neighborhood as he was departing and he himself had locked and checked the front door. The back door to the house was also locked and examination of the house immediately after the body was discovered revealed no trace of a forced entry or break-in. The undisturbed appearance of the interior of the McDonald residence, including the bedroom, also belied outside intrusion, and the absence of any signs of a struggle intimated that the killer was not a stranger but one freely admitted to the marital bedchamber. The fact that money, jewelry and expensive wristwatches in open view atop the bedroom dresser were left untouched further confounds any "burglar as the murderer" theory. The absence of any evidence of sexual assault rules out a rapist-murderer. Thus, the evidence plainly permitted the conclusion that only

one person had a plausible opportunity to murder the victim, petitioner.

Some proofs directly implied petitioner's guilt. Others tended to exclude the possible guilt of anyone else, thereby enhancing the quality of the positive proofs. For example, the evidence clearly indicated a continuing tension in petitioner's relationship with his wife. As noted earlier, his satement to the authorities acknowledged "heated arguments" with the victim in the recent past, contemplation of divorce and consultation of an attorney to that end only three weeks to one month prior to his wife's murder and an ongoing extramarital affair with another woman. These factors, when combined together, suggest that petitioner had reason to desire his wife's death.

Furthermore, aspects of the defense case, particularly Jeanne McDonlad Katz's deposition regarding her mother's habits reinforced the showing that petitioner had been the victim's killer. As the prosecutor noted in his summation, the Katz deposition demonstrated the unlikelihood of any claim that Doris McDonald had survived the night of December 15-16 only to be killed by an intruder after petitioner's departure that morning.

Upon considering the facts and circumstances adduced in this case as well as inferences reasonably derived from them, the jury below was convinced beyond a reasonable doubt that petitioner had killed his wife. The question now becomes whether "reviewing that evidence in the light most favorable to the prosecution," any rational trier of fact could have reached the same conclusion. *Jackson, supra.* As exhaustively delineated above, the circumstances demonstrated beyond a reasonable doubt that only petitioner had both opportunity and motive. It is clear that petitioner was shown to have ample reason to wish his

wife dead. The factors include his relationship with Ms. Boffman, the belief his cancer was terminal, and the general deterioration of his marriage. The prosecutor commented in summation that this was a murder of hatred, and the multiple gunshot wounds to the victim's head, fired at close range, offer substantial support for that characterization.

In view of the foregoing, it is thus clear that all this Court would do, in light of its recent decision in *Jackson, supra,* is to again review the evidence, a task already undertaken in plenary manner by trial and appellate judges. Therefore, there are no evident reasons for this Court to review the matter on *certiorari.* The relevant law is undisputed, as are the facts. *U.S. Sup. Ct. R.* 17.1. All that remains is an evaluation of circumstantial evidence, a process for which a properly instructed trial jury is best suited, as was the case here.

POINT II

Petitioner's non-custodial statement to a police detective was properly admitted into evidence.

A. Introduction

Petitioner's second attempt to obtain review of his well-founded conviction is, in effect, a request for this Court to again engage in fact-finding. Respondent submits that this is an insubstantial ground for the grant of *certiorari.* No adversary criminal proceedings had been commenced at the time of the allegedly improper interview. Nor was the questioning a custodial interview. Petitioner had been advised of his rights three times during the course of the investigation. After taking the affirmative step of retaining counsel, and thereafter, of reviewing the matter with

counsel during the investigation, petitioner nevertheless discussed the facts during the investigation with police on several occasions in non-custodial settings.

Evidently, petitioner decided to cooperate with the police in an apparent and ongoing attempt to further his own interest. One of these non-custodial interviews, on March 10, 1977, was addressed to petitioner's incriminatory post-murder behavior. Petitioner's statements led the detective, and could have led the trial jury, to believe that petitioner's post-murder conduct was indicative of a consciousness of guilt. Without assessing the beneficial effect he might have reaped from his cooperation with the police from preceding interviews, he now challenges the March 10, 1977 interview itself as somehow interfering with his right to counsel.

After the discovery of Doris McDonald's body, the investigating officers interrogated all those present at the crime scene. Prior to the questioning of petitioner herein, Detective Zimmerman administered the *Miranda* warnings. Petitioner thereupon waived the protection of his constitutional rights, signed a *Miranda* warning card and responded to the detective's inquiries. Later that evening, petitioner rendered a formal statement at the County Prosecutor's Office. This too was preceded by recital of the *Miranda* rights by the investigators and waiver thereof by petitioner at that time before administration of a polygraph. Finally, petitioner was reapprised of and waived his rights. During the ensuing months of the investigation, Detective Zimmerman called upon petitioner at either his home or place of business on several occasions. At these times, Detective Zimmerman did not reiterate the full *Miranda* warnings; he merely advised petitioner that he was not obligated to speak with the authorities. Petitioner, however, invariably responded to Detective Zimmerman's inquiries.

On March 10, 1977, Detective Zimmerman visited petitioner at his business to inquire about the condition of the bedroom wall and the clock/radio which had been in that room. As before, the detective did not preface his questions with recitations of the full *Miranda* warnings. He merely readvised petitioner of his right to refuse the interview. And as before, petitioner chose not to invoke that right. Thereafter, in response to queries about the whereabouts of the clock/radio, petitioner voiced the telling falsehood that his son-in-law, Larry Shafer, had thrown it out. This was introduced at trial over petitioner's objection.

B. There is no right to counsel before the institution of adversarial proceedings or at a non-custodial interview.

Respondent would note that the strictures of the *Miranda* decision apply only to custodial interrogations; the rule of that case and its progeny are implicated only when the individual has been taken into official custody or otherwise deprived of his freedom of action in a significant way. *Edwards* v. *California,* —— U.S. ——, ——, 49 *U.S.L.W.* 4496, 4497-498 (May 18, 1981); *Rhode Island* v. *Innis,* 446 U.S. 291, 298 (1980); *Oregon* v. *Mathiason,* 429 U.S. 492, 494-495 (1977); *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966). In the instant matter, petitioner was neither in custody nor in any way deprived of his freedom of action. The interview was conducted at petitioner's place of business and at its conclusion petitioner presumably went back to job duties. Hence, the administration of *Miranda* warnings was not required, so the failure to give full warnings cannot base a claim of error.

Nor can petitioner claim that the March 10 interview had abridged his Sixth and Fourteenth Amendment rights to counsel. As has long been established, the right to counsel in a constitutional sense does not attach until the insti-

tution of some form of adversary judicial proceeding, whether it be formal charge, preliminary hearing, indictment, information or arraignment. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972); *Powell* v. *Alabama*, 287 U.S. 45, 66-71 (1932). It does not accrue, however, during investigatory stages which precede a formal charge. *Kirby* v. *Illinois, supra* at 406 U.S. at 689. In the matter herein, the interview in question preceded the institution of any formal adversarial proceeding against petitioner by more than three months. Accordingly, it is clear that petitioner had no Sixth Amendment constitutional right to the presence of counsel during his meeting with Detective Zimmerman.

Nor was there any interference with the attorney client relationship, and thus there is no error in a constitutional sense. See *United States* v. *Morrison*, —— U.S. ——, 101 S.Ct. ——, 66 L.Ed.2d 564 (1981); *United States* v. *Henry*, —— U.S. ——, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In each of the preceding cases, the prosecution's conduct was designed to insert a barrier between the accused and counsel. Indeed, in those cases, the accused was warned not to exercise his rights. Of course, here, petitioner was not an "accused." And, the interviewer was solicitous in reminding him of the absence of any legal requirement that he speak. Factually, as the trial and appellate courts found, there was no interference with the right to counsel.

Finally, there is no need to suspend common sense in this matter. Petitioner was a businessman, of more than usual alertness, well aware of his rights, who had retained a lawyer to assist him. It strains the bounds of reason to intimate he did not know exactly what he was doing when he spoke with Detective Zimmerman. He went to counsel when one of his daughters had been interviewed, taking the woman to see the attorney. There is no reason to believe that petitioner's access was hindered or the relation-

ship hampered in any way by Detective Zimmerman. His own tactic backfired, and he now tries only to raise his own misstep to a constitutional level.

C. Petitioner's claim of due process violation was not advanced at the appellate level but if it was preserved, no violation is evident.

Petitioner appears to argue that Detective Zimmerman was under a duty to notify defense counsel of the March 10 interview and his failure to do so constituted a violation of due process. In support of this contention, petitioner relies upon *United States* v. *Thomas,* 474 F.2d 110 (10 Cir. 1973), *cert.* den. 412 U.S. 932 (1973), and its progeny as well as DR7-104(A)(1). Petitioner claims that the courts below viewed the interview "as constituting, at most, an ethical infraction rather than a deprival or infraction of his right to counsel." (Petition, p. 36).

There are two threshhold inadequacies in this analysis. First, his only allegation of a "due process" violation in the New Jersey Appellate Division, was that the 14th Amendment's due process clause is the means for application of the 6th Amendment to the States, as indicated in Point IIB, *supra.* Although he made an argument of ethical breach to the courts, he never claimed an independent 14th Amendment violation derived therefrom. The State appellate court dealt with the matter as an ethical breach and not a due process violation. (App., p. 29). So, the issue arises for the first time now before this Court. This raises the second inadequacy in dealing with the claim. The New Jersey court noted that "even assuming" an ethical breach had occurred, no relief would have been warranted. This is not the same as holding "at most" an ethical breach occurred. The latter implies the occurrence, the former does not; the court thus did not imply that an ethical breach occurred.

Much of what has been set forth in Point IIB, *supra*, applies here. Granting for purposes of this argument the long-standing sanctity of the attorney-client relationship in the common law, and accepting similarly for argument's sake that any governmental interference therewith may run afoul of fundamental notions, it is clear that this case does not present a vehicle for establishing any such conceptual structure. The facts discussed above show no tampering and no interference. Petitioner herein was routinely questioned at his place of business and presumably returned to his job duties the moment the interview concluded. In such situations, courts have held there is no obligation to notify counsel. See *People* v. *Merkel*, 23 Ill. App. 3d 298, 302, 319 N.E.2d 77, 81 (App. Ct. 1974). See also, *United States* v. *Masullo*, 489 F.2d 217, 221-223 (2 Cir. 1973). Moreover, as noted, if any right existed, petitioner waived it.

D. Petitioner waived counsel's presence at the interview.

Petitioner's contention is that waiver of the right to counsel could not be inferred from his conduct on March 10 and that the waiver of this right must always be explicit does not merit extended consideration. Suffice it to say that this Court recently has determined that waiver of the right to counsel need take no designated legal form. See *North Carolina* v. *Butler*, 441 U.S. 369, 374-75 (1979).

In the instant matter, the trial and appellate courts concluded that petitioner had been fully aware of his rights at the time of the March 10 interview, including his right to have counsel present. He cooperated on prior occasions. Petitioner chose to respond to Detective Zimmerman's questions. That such conduct manifests a clear waiver of the right to counsel cannot be disputed. Accordingly, for that reason, as well as the other arguments presented here-

in, respondents respectfully submits that petitioner's March 10 statement was properly admitted into the trial record and presents no constitutional issues.

POINT III

Petitioner's motion to dismiss the indictment for prosecutorial misconduct was properly denied and presents no issues for certiorari.

Petitioner alleges a third factual failing in the proceedings. Here he contends the grand jury returned its indictment on the basis of false testimony. Since the medical examiner gave testimony more favorable to petitioner at trial than he did before the grand jury, respondent cannot perceive the existence of any viable issue. Simple application of *a fortiori* reasoning dispels any intimation of error. Applicant was adjudged guilty beyond any reasonable doubt by a unanimous petit jury with the benefit of the allegedly less favorable evidence than the grand jury which indicted by a mere majority vote on a standard of proof akin to probable cause. Moreover, petitioner had discovery of the grand jury evidence and could have cross-examined thereon, had he so chosen.

In any event, it is respondent's position that petitioner's allegations are unsubstantiated by the record. Again, as with the previous points, the relevant standards are well established; the prosecution's knowing use of perjurious testimony in the grand jury level is sanctionable. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338 (1974). But petitioner seeks only to apply a potentiality to facts which respondent submits do not support the position. No constitutional issues are at stake.

At the grand jury level, respondent's medical expert was asked to pinpoint the time of death, which he did. This testimony was part of a longer exposition concerning the time frame in which the victim could have died. The pinpoint logically led to the conclusion that petitioner was the murderer. Knowing that the petitioner had arrayed against the respondent a battery of "super-star" medical experts to contest the respondent's findings, the prosecution contented itself with the more general testimony. Of course, since applicant had discovery of the grand jury testimony, he could have cross-examined the expert thereupon had he chosen. He chose not to do so and has instead contended that the grand jury testimony was somehow false. In point of fact, it obviously was not false and his characterization thereof as false is baseless.

The county medical examiner testified at grand jury that he had commenced a preliminary examination of Doris McDonald's body at 4:50 p.m. on December 16, 1976. A full autopsy was performed the following morning (TGJ 21-8 to 24). After noting the placement of the victim's various wounds and rendering his opinion on the cause of death, Dr. Shuster gave 2:00 a.m. on December 16 as his estimation of the time of the victim's death (TGJ23-6 to 14). Based upon the lividity, *i.e.*, the settling of the blood in one area of the body after death, the doctor opined that the victim "had been dead a minimum of eight hours" prior to the preliminary examination conducted during the afternoon of December 16 (TGJ23-15 to TGJ24-2). *Rigor mortis* of limbs suggested that the victim had died 12 to 18 hours before the preliminary examination (TGJ24-2 to 7). When queried further concerning the probable time of death, Dr. Shuster replied that a "good estimation" would vary from five to six hours prior to 2:00 a.m. to three hours past 2:00 a.m. (TGJ24-23 to TGJ24-4).

As he had before the grand jury, the doctor testified at trial that the lividity of the victim's body indicated that she had been dead a "minimum of eight hours" prior to the preliminary examination (4T42-8 to 4T43-24). The degree of *rigor mortis* noted at that time indicated that the victim had been dead 12 to 18 hours prior thereto (4T40-8 to 4T42-7). Thus, based upon these observations, Dr. Shuster opined that Doris McDonald had ". . . died certainly more than eight hours prior to the time I saw her [namely, 4:50 p.m. on December 16] and somewhat less than eighteen hours." (4T44-25 to 4T45-7). The doctor was not asked for nor did he render a more restricted or precise estimation of the time of death at any point thereafter during the trial, neither on direct nor on cross-examination.

To attack the trial testimony, petitioner marshalls case law primarily invalidating indictments founded upon demonstrably prejurious grand jury testimony or deliberate governmental abuse of grand jury processes. None of the abuses decried by petitioner actually took place. Simply put, petitioner is complaining about things which did not happen.

The allegation that the prosecution was on notice of a change in Dr. Shuster's estimation of the victim's time of death was clearly disproved during the proceedings below. The State's trial prosecutor repeatedly indicated that from his review of the grand jury transcript, interviews with Dr. Shuster and discussions with others involved in the case, the 8 to 18 hour time of death estimate given by the doctor at trial was consistent with the doctor's grand jury testimony. (See 2TM4-10 to 2TM5-20; 2TM10-8 to 21; 2TM14-16 to 2TM16-12). He maintained this to be accurate, even though Dr. Shuster had also provided a narrow estimation of five to six hours

before to three hours after 2:00 a.m. to the grand jury in addition to his eight to eighteen hour estimate before that body (2TM12-9 to 2TM13-15). The prosecutor further believed that Dr. Shuster would have reiterated his narrower estimation at trial had he been asked for it. The doctor simply had not been asked (2TM13-16 to 2TM14-22). In sum, the prosecutor was aware of no change in the doctor's opinion on the subject.

As was subsequently established, the prosecutor was unaware of changes in Dr. Shuster's opinion because there were none; at the motion hearing, the doctor testified that his opinion concerning the outer limits of the time of death estimate were no different at present than it had been initially (2TM19-8 to 20). Dr. Shuster recalled his testimony before the grand jury and perceived no conflict between it and the eight to eighteen hour time span he had later related at trial (2TM19-21 to 2TM20-5).

When subsequently pressed on this point by the defense, Dr. Shuster specifically referred to the portion of the grand jury transcript (TGJ23-22 to TGJ24-2) which confirmed that he had stated Mrs. McDonald had been dead for a minimum of eight hours prior to the preliminary examination of her body conducted shortly before 5:00 p.m. on December 16, 1976 (2TM25-13 to 2TM26-17). Subtracting eight hours from 5:00 p.m. put one outside limit of the estimated time of death provided the grand jurors at the same 9:00 a.m. figure given at trial (2TM26-18 to 25). The doctor nevertheless adhered to his grand jury opinion that the more probable time of death had been three hours either way of 2:00 a.m. He recalled, however, that he had not been asked for this more precise estimation during the trial (2TM27-1 to 24).

Finally, the trial jury had the benefit of the "exculpatory" eight to 18 hour estimation that petitioner now in-

sists should have been emphasized before the grand jury. Nothwithstanding that, the trial jury found petitioner guilty of the crime charged beyond a reasonable doubt. To conclude that the grand jury, whose mandate need satisfy a far less demanding standard, would not have returned an indictment on the basis of evidence which the trial jury found sufficient to convict requires more than acquiescence in anomaly. No constitutional issues are presented.

CONCLUSION

For the foregoing reasons, respondent, the State of New Jersey, respectfully requests that this Court decline to issue a writ of certiorari.

Respectfully submitted,

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